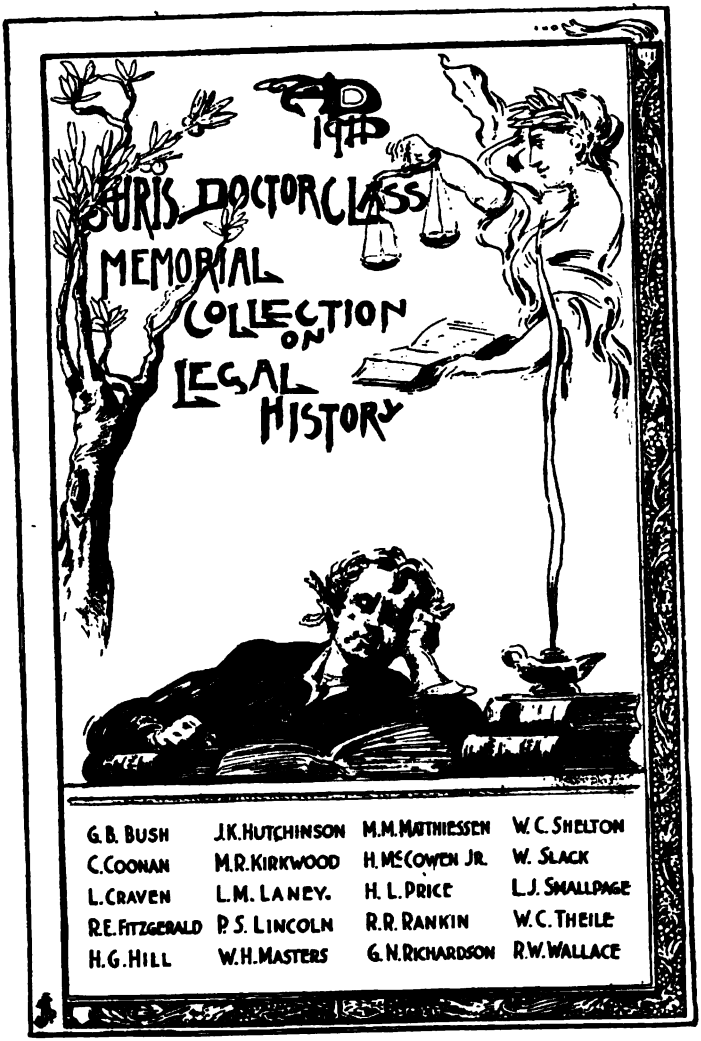
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THE

HISTORY OF THE LAW OF TITHES

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THE

HISTORY OF THE LAW OF TITHES

IN ENGLAND.

BEING THE YORKE PRIZE ESSAY OF THE UNIVERSITY OF CAMBRIDGE FOR 1887.

BY

WILLIAM EASTERBY,

B.A., LL.B. ST JOHN'S COLLEGE AND THE MIDDLE TEMPLE.

"Est modus in rebus, sunt certi denique fines."

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TO MY FATHER,

WILLIAM EASTERBY, LL.D.

I DEDICATE THIS BOOK,

AS

A TRIBUTE OF AFFECTION

AND AS

A TOKEN OF MY GRATITUDE.

PREFACE.

In the following pages an attempt has been made to deal with the History of the Law of Tithes, as far as concerns the arrangement, upon a plan which if somewhat novel has still the slight merit of being both scientific and peculiarly adapted to carry out one of the objects for which the work was written. That is, to present to the reader a short and clear history of the rise and growth of the Tithing System in this country, free from technical and other difficulties. The plan adopted is first to treat of the history of the Substantive, and then of that of the Adjective Law of Tithe. The first six chapters are devoted to the former, and thus in a succinct form what may be called the more popular and to the general reader the more interesting part of the subject is comprised. The seventh chapter has an intermediate position, and deals with the history of Titheable matters; the eighth, ninth and tenth are occupied with the Adjective Law or Procedure, the tenth being devoted entirely to the consideration of Discharges and Exemptions. The law as regards the City and Liberties of London is shortly dealt with, apart from the other portions of the work, in the last chapter. The working-out of such a plan as the above necessitates a certain amount of overlapping and repetition, but this, it is hoped, does not constitute a formidable disadvantage.

The Author has avoided any political treatment of his subject. He has touched very lightly on the alleged tripartite division of tithe upon which the claim of the poor to a share is based, as the existence of such a division is not revealed in the impartial history of the law, and the statute of Richard II., which compelled the monasteries to give as alms a part of the revenues of an appropriated benefice after suitable provision for the vicar had been made, imposed a new charge on the monasteries, and did not refer to parochial tithes.

The references to Selden will all be found in his great work on the *Historie of Tithes* (A.D. 1618), to which the Author is greatly indebted. He has also extensively used Mr Haddan and Bishop Stubbs' *Collection of Councils and Ecclesiastical Documents*, which for brevity are referred to as "H. and S."

St Asaph, N. Wales,
30 *November*, 1887.

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INTRODUCTION.

"In examining an expression," says Sir Henry Maine when speaking of the term Equity[1], "which has so remote an origin and so long a history as this it is always safest to penetrate if possible to the simple metaphor or figure which at first shadowed forth the conception." We may well apply this rule to an elementary historical consideration of the term "tithe." First, then, etymologically tithe in its proper sense is "tenth," the words in fact being doublets, the original form of which appears in Anglo-Saxon as *teóða*, whilst its modern description is "the tenth part of the produce as offered to the clergy." The original metaphor appears to be the offering of a certain part to those who administer the benefits of religion in return for their administration. Thus in the early Biblical narrative we read how Abram gave a tenth of his booty after the kings' war as an offering to the High Priest. Jacob vowed tithes at Bethel, and under the Mosaic Law most onerous and well-nigh intolerable payments were exacted to support the priestly class.

Although the Romans were, comparatively early in their history, freed from the iron bonds of sacerdotalism, the potency of gods was often specially recognised after a successful campaign by the offering to their service of a tenth of the booty. A profitable sale was often made the occasion for a vow of a tenth of the profits, but the gods were precluded from being instituted heirs lest the property so left should only go to increase the luxury of the priests[2]. As Rome proceeded to her world-wide dominion direct taxation except as regards customs became unnecessary[3]. The tribute paid by conquered provinces went

[1] *Ancient Law*, p. 58.

[2] Ulpian *Frag.* 22. 6.

[3] Niebuhr's *Rom. Hist.* vol. II. p. 219.

into the coffers of the government and was used for its support and that of the sacred colleges. Indeed the fruit of that great triumph of Paulus after the victory of Pydna, as he marched to the capitol clad in the vesture of Jove himself, was the upas-like secretion finally resulting in the degradation and demoralisation of the Republic.

In the same way, the Greeks were wont to dedicate to the gods, after a success in battle, a tenth of the spoils[1], and this practice seems to have been fairly general in the early African kingdoms, although the Punic exactions for the support of religion were particularly hard and onerous. We have thus seen that the payment of tithes or tenths has existed from the earliest times, we now come to consider briefly the practice after the introduction of Christianity.

First of all we may note that there is no special enjoining of the tithe system in the New Testament, and it is not until the time of the Fathers SS. Jerome, Augustine, and Chrysostom that the right of the clergy to tithe of the produce of land is laid down. The excessive bounty of the early Christians, who in their zeal for the new faith literally sold all to follow the Cross, and the communistic principles under which they lived, supply abundant reason for the fact, that no claim to the tithe of increase is made by the earliest Christian clergy on the ground that they are the representatives of the Levitical priesthood, till close upon the fifth century. This communistic method of living however did not survive long after the time of the Apostolic fathers. In the three hundred years that intervened the Christian Church was supported by purely voluntary offerings[2], which, besides being devoted to clerical purposes, were also applied to charitable uses. Selden[3] appositely remarks that the opinion of Origen, who lived about 200 A.D., was that first-fruits were due to the Church, but he does not mention tenths as being due.

At the end of the fourth and the beginning of the fifth centuries such a claim as of right is laid down by the Fathers, both of the Greek and of the Latin Church[4]. This right

[1] Xen. *Anab.* v. 3, 4, 5.
[2] Tertullian, *Apol.* 39.
[3] Selden, IV. 3.
[4] H. and S. III. p. 637.

however is not described as possessing a legal sanction, it is one of moral and religious obligation, and is thus maintained by SS. Ambrose, Augustine, Jerome, and Chrysostom, the first two holding that a full tenth is due by God's Law, the latter that not less than a tenth should be offered[1].

Again, in several Councils of the Church the payment of tithes by the faithful is insisted on[2], one of the earliest of which is that of Tours held in the year A.D. 567, where it is declared, "But we most earnestly press this upon you, that, following the example of Abraham, it may not grieve you to offer to God tithes of all for the preserving of the remaining goods which you possess." ("Illud vero instantissime commonemus ut Abrahae documenta sequentes, decimas ex omni facultate non pigeat Deo pro reliquis quae possidetis conservandis offerre.") And again this is more strongly enjoined by the Council of Mâcon, held A.D. 589—the authenticity of which Selden[3] denies, and he further adds that no law synodal or pontifical occurs, where tithes are enjoined to be paid till near the end of the 8th century. Payment of tithes being thus enforced by a moral and religious sanction it remains for us to show the attachment of a legal sanction. This was done for the Frank kingdom by Charles the Great A.D. 779, and afterwards in the year 787 when he had become Emperor these laws were received as Imperial laws. It was ordained as follows "concerning tithes; that each person shall give his tithe, and that they be dispensed according to the order of the bishop." ("De decimis; ut unusquisque suam decimam donet, atque per jussionem pontificis dispensentur[4].") By this enactment the eleemosynary nature of tithe in the Frank kingdom ceased. It at once assumed a legal character. "The tithe," says Milman, "was by no means a spontaneous votive offering of the whole Christian people. It was a tax imposed by imperial authority and enforced by imperial power[5]." Summing up the general history of the subject at this period Hallam[6] says, "We find the payment of tithes first enjoined by the canons of a provincial council in

[1] Bingham's *Antiq.* II. 81, 85.
[2] *Council of Tours*, A.D. 567.
[3] Selden, 58-60.
[4] Capitt. (ed. Baluze) I. 141, 142.
[5] Vol. II. p. 292.
[6] *Mid. Ages*, p. 335.

France near the end of the sixth century. From the 9th to the end of the 12th century and even later it is continually enforced by similar authority. Father Paul remarks that most of the sermons preached about the 8th century inculcate this as a duty, and even seem to place the summit of Christian perfection in its performance. This reluctant submission of the people to a general and permanent tribute is perfectly consistent with the eagerness displayed by them in accumulating voluntary donations upon the Church. Charlemagne was the first who gave the confirmation of a civil statute to these ecclesiastical injunctions; no one at least has, so far as I know, adduced any earlier law for the payment of tithes than one of his capitularies."

We have then arrived at the point where the right to tithes is established on the continent of Europe. They are paid to monasterial houses, to the clergy and the poor, and perpetual consecrations are often made at the pleasure of the owner. Before proceeding to the more particular part of the subject of this essay, viz. that which refers to the History of the Law of Tithe in England, it may be as well to consider the question as to the existence of tithes in the British Church as distinguished from the Anglo-Saxon.

How and when the Britons embraced Christianity or who was "the first that ever burst" into the sea of their savagery are questions not for us to determine. Suffice it to say that at the end of the 2nd century there were regions in Britain inaccessible to the Romans "subdued to Christ[1]." During this time too a full diocesan episcopacy existed, as is shown from the signatures to the Council of Arles (A.D. 314) summoned to suppress the Donatist heresy. There does not seem to have existed in the British Church any division of dioceses into parishes. The diocese itself was the parish, and the churches studded over it were used more as mission-houses or capellæ. The ministering clergy lived together in the collegium or monasterium, the head of which was the abbot. These monasteries were at first supported by the free-will offerings of the people[2], but as they became more numerous and the obligations and benefits of religion more understood and appreciated, these

[1] Tert. *adv. Judæos*, c. 7.

[2] Thomas, *Hist. of St. Asaph*, p. 14.

casual offerings took a more systematic form. At length certain kinds of produce were taxed voluntarily, and lords of the soil in founding churches would reserve as an endowment what we may call a rent-charge as a provision for some member of their family. This was in the nature of a creation of an advowson, and it was the natural result that the succession to the benefice became hereditary. This peculiar endowment accounts for many of the endless moduses which in later years make the history of the law of tithes almost appear frivolous.

After the Saxon invasion the British Church still existed in the parts known as Strathclyde, North Wales, and West Wales. By this time the monastery had become the bishopric, and the abbot the bishop. New churches have now sprung from the mother-churches, and the latter have secured some service from their offspring. Here we see the origin of those cases where in one parish a part of the tithes is payable to another.

Even in these early days there appears to have existed a substantial connexion between the Welsh State and the Welsh Church, for in the famous code of Howel the Good it is declared to be "the duty of the sword to protect the staff," the privileges of the Church, her rents, services &c. being dependent on the land are also dependent on the king. In the compilation of those laws the assistance of the clergy is specially invoked "lest the laity should enact anything that was contrary to the Holy Scripture[1]."

Finally, it remains for us to add that from the refusal of the British bishops to acknowledge the supremacy of the See of Canterbury at the Conference of Augustine's Oak, the Welsh Church maintained for a long time, in a limited degree, its independence. The settlement of the great controversy, which divided Christians into two opposing hosts as to the proper time for the celebration of Easter, was effected as regards England by the Council of Whitby in A.D. 664. The Roman method was then adopted, but it was well-nigh a century before the British Church acquiesced in the rule. North Wales agreed to follow the English and Roman course in the middle of the 8th century[2]. A Welsh victory over the English at Hereford

[1] H. and S. I. p. 219.

[2] *Ant. Brit. Church*, p. 250.

for a time upheld the refusal of South Wales, but the latter submitted a few years later (A.D. 777). Attempts were however made to return to the ancient practice, and though the virtual supremacy of Canterbury over the British Church may be said to date from the above settlement, the constant disputes that were ever arising between the two Churches show it to have lacked that finality, which only the process of the years could bring. It was not till after the Norman Conquest that jurisdiction was directly claimed by, and not till the middle of the 12th century that the last Welsh bishop finally gave in his adherence and professed obedience to, the Primate of All England.

CHAPTER I.

Of the five invasions to which our country has been subject the little Isle of Thanet, hardly distinguishable from the marsh and mud of the Thames bank, has been the spot where twice the foreign foot has first touched our soil. Scarce a century had elapsed since Hengist and his fierce war band landed at Ebbs-fleet, ere the little company of monks under Augustine commenced there the peaceable invasion which reduced England to Christianity.

Surprised and amazed Augustine well might be, when he found at Canterbury the ruined remnants of an ancient Christian church, and, dimly as it were, heard of the existence of another in the heart of Wales. But in England itself the very memory of the British Church had passed away. Fifty years had been quite long enough to efface from recollection the brave asceticism of the monks, who, from the monstre monastery at Bangor Is y Coed, had followed the army of the Britons to death and defeat before Ethelfrith of Northumbria. It is not our business to trace the course of the conquering Christianity. Thirty-five years saw the new religion fairly established, though the death-struggle of heathendom was yet to come. To Augustine the early lawyers are wont to refer the introduction of the custom of tithe-paying, chiefly on account of one of the answers sent by Pope Gregory the Great to him. The question referred to the payment of the clergy, and Gregory advises Augustine and his monks to abide by the rule of the

Apostles, "to all of whom all was common[1]." The usual plan, however, he explains, was to divide the free-will offerings into four parts, for the bishop, the clergy, the poor, and the repair of churches[2]; but there is no mention of tithes, and as we shall see they were of a later growth. Augustine and his immediate followers were essentially missionaries. They converted the king first and the people after. Dioceses coincided with kingdoms, and the bishop himself was but a royal chaplain. He was both rector and bishop of his parish or diocese, and after the tithing system was established, the right of all tithes belonged to him. These dioceses were manifestly too unwieldy, too few, and too large. Further a great schism divided the Saxon Church in the middle of the 7th century, and though it was merely the final contest of Rome for supremacy over the Irish Church, yet it was a contest of vast importance to England. The secession of the monks of Holy Island, after the judgment of the Council of Whitby, left in England a united Church. It was to re-organize and consolidate this united Church that Rome sent over a priest whose work remains to us to this day. Theodore of Tarsus landed in A.D. 668, and the diocesan church which exists now is practically the same as he left it in A.D. 690. New sees were created and grouped round Canterbury as centre, and new bishops acknowledged her bishop as primate. To Theodore has also been attributed our "parish" system in the modern sense, but this is a mistake due to a confusion of the ancient and modern senses of the word "Parochia." In the ancient sense it denotes a bishopric or see, and these Theodore did constitute; but the modern parishes are of a natural growth. They are the natural descendants of the original *mark*, and their confines the confines of the village community[3]. The process of the formation of a parish would be somewhat as follows. In building and dedicating churches the founders used as boundaries those already established for the township or village community. There might be some existing in the latter part of the 7th century[4], but there were none in Northumbria as

[1] Greg. *Ep.* l. 9. 59. Maimbourg, 201—16.

[2] H. and S. III. p. 19.

[3] Digby, *Hist. Real Ppty. under Parishes.*

[4] H. and S. III. p. 122.

far down as the year 734. In later Saxon times these townships with the churches situated in them became manors, a name first used in the reign of Edward the Confessor. "The services were rendered to the supreme landowner who at the Conquest became a Norman instead of a Saxon. The name manor becomes now general, and England is parcelled out into manors often coinciding with the boundaries of the parish[1]."

As early as Theodore's time the duty of giving tithes to sacred purposes was part of the law of the Church, and as we have already seen it was established by Church Councils on the Continent. Thus we find in Theodore's Penitential II., 2. 7, "A priest is not bound to pay tithes" (Presbitero decimas dare non cogitur), and again *ib.* 14. 1, "The proper seasons for fasting are three a year for the people, viz., forty days before Easter, when we pay the tithes of the year (ubi decimas anni solvimus)." The custom having thus been established as a moral obligation, we shall now proceed to trace the different steps by which it gradually became established by law. In later times, when parishes have become more defined and settled, the mission church (capella), or that built by the lord, becomes the parish church, the mission priest, or the lord's chaplain, the parish priest, and the tithes paid by the lord's holding the permanent endowment of the minister of the parish.

(1) It has often been held, that the earliest tithe laws by which a legal sanction was first attached to the already existing moral obligation on the part of Christians to pay tithes, are contained in a collection of Canons, attributed to Egbert, archbishop of York, and supposed to have been written between the years 743 and 767. The substance of the canon in question is that the priest is to teach the people to pay tithes and to keep a register of them himself. There is also a tripartite division of them for the church fabric, the poor, and the priest. Comber[2] and others uphold the validity of these canons, but Selden[3] rightly declares them to be spurious. "The fact that these Excerptiones contain extracts from the Capitularies of Charles the Great is fatal to their claim to be regarded as

[1] Digby, *ibid.* [2] *Hist. Vind. of Div. Right of Tithes*, 1685, p. 167.
[3] Selden, p. 197.

Egbert's[1]." They therefore cannot be regarded as the earliest tithe-laws.

(2) In the year 787 the first real legal sanction was attached and the payment of tithes made compulsory; and this it will be observed was contemporary with the tithe legislation of Charlemagne. In the previous year Pope Adrian I. sent legates to Britain "to renew the faith." These legates were George, bishop of Ostia, and Theophylact, bishop of Todi. Two important synods were held, one in the north under Ethelwald, king of Northumbria at Pincahala—either Finchale in Durham, or Wincle in Cheshire—and the other in the south under Offa, king of Mercia, both in 787. The legates had previously met Offa and Kynewulf, king of the West Saxons, on their landing in 786, but the latter king was killed in that year. At the southern council, which was held at Celchyth, or Chelsea, the decrees of the northern council were confirmed. The legates sent a lengthy report of the proceedings to Adrian, Chap. XVII. of which is headed, "That tithes be paid in full" (Ut decimæ juste solvantur)[2]. After quoting some scriptural commands as to tithes it says, "Wherefore we do solemnly enjoin that all take care to pay the tenth of all that they possess because that specially belongs to God; and let each one live on the remaining nine parts and give alms; and we advised that he does these in secret because it is written 'When thou givest alms sound not the trumpet'" (Unde etiam cum obtestatione præcipimus, ut omnes studeant de omnibus quæ possident decimas dare, quia speciale Domini Dei est: et de novem partibus sibi vivat, et eleemosynas tribuat, et magis eas in absconditis facere suasimus, quia scriptum est, "Cum facis eleemosynam, noli tuba canere ante te"). The decrees of this council it will be noted were accepted as binding by the king and Witan of Mercia and Northumbria, and in all probability by the Witan of the West Saxons. There does not appear to be any other enactment extant, in which is laid down the obligation to pay tithes, though, as we shall see, it is established as law in the time of Edward the Elder, 901. In what way the decrees of

[1] H. and S. III. p. 415.

[2] H. and S. III. 456.

the councils were enforced, or whether they were enforced at all we do not know[1].

(3) Next may be noted two mistakes made by the old chroniclers, which have been the cause of much misconception as to the legal origin of the right of the clergy to tithes. The first—one not nearly so fertile a source of error as the second—is that Offa, king of Mercia, made a grant of all the tithes of his kingdom to the Church as a penance for a murder which he had committed. The second is, that a similar grant was made by Ethelwulf in the year 855. In the opinion of modern historians this grant which has been supposed by many to be the original deed of gift upon which the legal right to tithes in England depends, does not really relate to tithes. The explanation of this Charter given by Kemble in the Codex Diplomaticus[2] is now regarded as correct. Ethelwulf at that time being humbled and terrified at the success of the Danish invaders, decided to liberate a tenth part of his estate from the services and exactions which accrued by their hereditary tenure, whether they were in the hands of the clergy or the laity. "He released from all payments except the inevitable three," i.e. the trinoda necessitas, viz.: Fyrd, Brig-bot, and Burh-bot, a tenth part of the *folc-land* or unenfranchised lands, whether in the tenancy of the Church or his thanes. In this tenth part of the lands so burdened in his favour he annihilated the royal rights of *Regnum* or *Imperium*. The charter thus amounts to a grant of freedom from royal taxation to a tenth part of his lands. In an important note on this charter

[1] In his "Ancient Facts and Fictions concerning Churches and Tithes" which was published after the completion of this Essay, pp. 144—167, Lord Selborne disputes the legislative character of the Acts of these Councils. He declares from an examination of "external and internal evidence" that their character is that of "a pastoral precept and not legal enactment," in fact that there is no sanction attached to the articles but a spiritual one. In this view he is opposed by such great authorities as Haddan and Bishop Stubbs and by several others. His strongest arguments are deduced from the form of the Legate's report, but they are discounted by the very fact that it was merely a report. It does not pretend to be an exposition of the laws but only to declare what the legates actually did. It is a narrative of their work and not a copy of the Statutes passed. Some of the articles are expressly called "decrees," and others "admonitions," and others "discourses."

[2] (K. *C. D.* MXLVIII) (CCLXXV).

in Haddon and Stubbs' *Councils and Ecclesiastical Documents*[1], the subject is thus summed up: "The bearing of the whole discussion on the subject of tithe appears to be, that Ethelwulf merely used the tenth as a convenient measure for ecclesiastical and other benefactions; and that this testifies to an established, or at least, a growing recognition of the tithe as a clerical portion. The measure, whatever its character, affected Wessex only." We may also add, that as the Legatine Councils of 787 had the force of law, Ethelwulf's donation could not be a gift of tithes. Lord Selborne[2] appropriately remarks with reference to this charter that Messrs Haddon and Stubbs' note hardly does justice to the great authority of Selden. The latter—though he had his own view on the subject—states the question fairly as one of doubtful construction. Mr Clarke in his *History of Tithes*, published early in 1887, seems still to hold that Offa and Ethelwulf granted to the Church the tithes of the whole kingdom. He adopts the construction, that tithes were to be given as a free-will offering, and by this explains the fact that no punishment is laid down in the charter for disobedience. He attributes the granting of them to the Church to Roman influence over the weak and superstitious mind of the king. Such a construction of the charters has been abandoned by nearly all modern historians. An examination of them shows that Ethelwulf's act was merely an act of enfranchisement. It converted a tenth of the *folc-land* into *boc-land*, which thus became liable only to the three services, of military expeditions, and the repair of roads and bridges, and of forts.

(4) By the time of Edward the Elder, A.D. 901, we find the legal obligation of the tithe established as law. Among the conditions of peace between Alfred and Guthrum the Dane, and which were renewed by Edward his son, appears one for the payment of tithes. "If any one withhold tithes let him pay *lahslit* among the Danes, and *wite* among the English[3]." In this we first see a legal sanction attached to the legal obligation. It here takes the form of a penalty or mulct for non-payment. About the year 927 Athelstan issued a royal

[1] Vol. III. p. 637.

[2] *Defence of Church of Eng.* p. 131.

[3] Wilkins, *Leges Anglo-Sax.* p. 51.

injunction with the consent of the archbishops and bishops for all the realm, for the payment of prædial and mixed tithes and of living cattle, and ordered that his judges should see it well executed[1]. This, it must be remembered, was not an act of legislation. It was a royal command, and the penalty for non-obedience would be the same as that for contempt of the royal authority. Further, thirteen or fourteen years later, king Edmund[2], in a national synod made excommunication the penalty for non-payment. Thus we have a definite real sanction attached to the recognised religious obligation to pay tithes.

(5) The ordinance of the Hundred enacted by Edgar circ. 970 contains the first recognition of the rights of *particular* churches to tithes. We shall consider these laws more fully when we come to describe the growth of the parish system. It is sufficient here to state that by it tithes are to be paid to "the old Minster to which the district belongs" both from a thegn's *in-land*, i.e. demesne, and from *geneat-land*, i.e. land cultivated by *geneats*, or those holding by service. The times for paying tithes are fixed at Whitsuntide, when tithe of cattle was to be given, and at Martinmas (ad aequinoctium) for earth's-fruits. The means of enforcing payment are very stringent. The king's and bishop's reeves together with the mass-priest of the principal church were to go to the defaulter and take the *whole* of his produce. The tithe due to the principal church was then taken and the defaulter given back one-tenth. The remaining eight-tenths were divided between the lord and the bishop. The above rules were re-enacted by Canute, and according to some authorities by Ethelred. The laws attributed to the latter are identical with Edgar's laws except in one point. Upon this the claim of the poor to a part of the tithes is based. The division given is tripartite, the third part being for the poor. There does not however appear to be sufficient authentication for this collection of laws. Lord Selborne[3] rejects it entirely. Perhaps his strongest argument is that had they ever been enacted Canute would have been asked to confirm them and not those of Edgar. He holds that they are of ecclesiastical origin and are part of the conflict between the regular and secular clergy. At this

[1] Selden, 214. [2] *Fleta*, 2, 47. [3] *Def. Ch. of Eng.* p. 132.

time the parochial system was in its infancy, and the monastic orders were naturally anxious to keep any endowments they could get hold of, especially as they themselves would at this time constitute the poor.

(6) A collection of laws, rights, and customs attributed to Edward the Confessor was made by William I. The laws of the Church are declared good, and a long list of titheable matter is given, such as wheat, flocks, goats, butter, cheese, bees, pigs, mills, fisheries, gardens, merchandise, &c. Recovery of tithes due was provided for in the Bishop's court, and aid could be obtained if necessary from the King's court. Of this elaborate collection Selden justly says that "it contains mixtures of later transcribers."

We have referred above to the origin of the parish system and seen how its germ lay in the *mark* of the old village community. From this the system itself was of natural and gradual growth. During the 8th century there were many churches built and endowed with tithes by the lords of the soil, and it also became customary to appropriate some of these churches by the lords, who were their patrons, to religious houses. As however religion spread the lords of the soil became desirous of having near their residences chapels and chaplains to administer in them for the benefit of both themselves and their under-tenants[1]. Such chapels and churches were continually being built all over the country, and the tithes of the lord's lands formed the endowment of the minister. In earlier times these tithes would go to the common treasury of the diocese and be then distributed by the bishop among his clergy as he thought fit. This plan naturally checked the devotion of rich men, and between the ninth and tenth centuries the practice was relaxed. Laymen were then allowed to endow the churches they had built with the tithes of the land which surrounded them, the limits being usually conterminous with the territories of the founders. In this way most of the parish foundations which exist now in all dioceses at first arose. The laws of Edgar referred to previously are the only legislative acts of the Saxon period which refer to the parochial system. This however is

[1] Selden, p. 259.

natural enough, for at that time the system itself was only in its infancy. Three kinds of churches are mentioned in the laws:

(i) The older or principal church;

(ii) Churches with burial grounds which lords might have on their manors or lordships;

(iii) Churches without burial grounds.

The laws give all tithes arising in the adjacent parish to the first class of churches provided there is no church of the second class; but should there be such a church then one-third was assigned to it, and the remainder to the principal church. As regards this principal church, some have held that it was the minster or cathedral of the diocese. Blackstone[1] seems to hold that the parish system existed in full in the time of Edgar. Selden however takes this to mean "the ancientest church or monasterie, where he hears God's service which I understand not otherwise than of any church or monasterie whither usually in respect of his commorancie—i.e. as an inhabitant of a house in a village or manor—he repaired[2]". That is the church which a landowner frequented when he had not one of his own. The second class of churches, viz. those having the right of sepulture even though built within the limits of the old parish, became themselves parish churches and took from the endowments of the old church those appertaining to the adjacent land and not merely the one-third given by Edgar's law. The third class of churches remained merely chapels of ease with no endowments abstracted from those of the mother church.

During the Saxon period a large number of abbeys were built and endowed, and it must be kept in mind that it was to them that tithes were chiefly paid. It was not till about the year 1200 A.D. that the practice of paying parochial tithes was fully established, though as we have seen it did exist in a limited form during the Saxon period. Up to the middle of the eighth century the clergy who occupied monasteries were of a mixed character. That is to say the well-known distinction between regular and secular clergy had not arisen. The disadvantages however of such a system were apparent, and by the 4th canon of the Council of Clovesho held in 747 a reformation

[1] Book IV. c. iv. [2] Selden, p. 268.

of the monastic system was effected[1]. It in fact established the distinction between secular and regular clergy, and hence began a breaking up of the monastic communities into separate houses of monks and canons. The cathedral clergy are now known as canons who live together without monastic vows. This had a great effect on the future of tithes, for the monasteries were free to use that influence over men's minds, which in after years secured to their institutions the arbitrary consecrations of the tithes of whole tracts of land.

[1] H. and S. III. p. 364.

CHAPTER II.

THE troublous times, through which our country passed in the years immediately prior to the Norman Invasion, had of necessity an effect upon the practice of paying tithes. We find that towards the end of the Saxon period the payment of them was virtually discontinued. Selden attributes this to the indolence of the clergy, who by this time had become so rich a body that they neglected to collect the tithes which were due. In Domesday Book tithes are scarcely mentioned, though the *real* endowments and revenues of the clergy are put down and valued. The property given to the religious houses during Saxon times had been for the most part held in common. After the Conquest this plan was changed. Portions of the revenues of principal churches were set aside by the Norman bishops for the canons as a common fund, whilst the remainder they kept for themselves. Separate endowments of lands and tithes were given to the deans and chapters, priors, and other principal officers of the cathedral churches. Further, out of the episcopal revenues the Norman bishop purchased estates for the endowment of prebendaries, and this practice lasted till about the beginning of the 13th century. Such separate endowments have remained more or less intact till the passing of the Cathedral Act of 1840, by which they were taken away and merged in the common fund managed by the Ecclesiastical Commissioners.

The refusal of the people to pay tithes, from whatever cause, having become so general and extensive at the time of the

second Henry, Pope Alexander III. interfered in order to re-establish the ancient practice[1]. In a letter addressed to the Bishops of Worcester and Winchester, he declares that it is the custom or institution of the Church of England, that each parishioner should pay his tithe of fruits to the church of his own parish. Even earlier than this Adrian IV. speaks of the parochial payment of tithes "as a known right." This however is certainly an anachronism as far as tithes in England are concerned. In the time of Henry II. no title to tithes was made out by merely parochial right[2]; but *prescription* and *consecration* were the grounds whereon they were demanded. The *Jus Parochiale* was merely the right of having the cure of souls and the free-will offerings of the people. When a church had been endowed and granted *cum decimis*, this and the *jus parochiale* gave the right to tithes. As the power of the canon law increased in the darkest age of our history, this distinction gradually faded. Arbitrary endowments, as we shall see in the next chapter, had ceased by the beginning of the reign of Henry III., and by the middle of that reign it had become received law that all lands were regularly to pay tithes to the parish or mother-church. The establishment of this parochial right is more easily seen a few years later, when after the passing of the statute "Circumspecte Agatis[3]" in the writ of Indicavit founded upon it, it is declared that in and before that time the parochial tithes were the most known revenue of the Church. And this, as is shown later in the reign of Ed. III., agrees with the count in a writ of Right of Advowson of Tithes, wherein the esplees are chiefly laid in tithes, because "the Advowson of the whole tithes is no other than the Advowson of the Church[4]." It has now become clear law, and has remained so that every parson has a common law right to the tithes within his parish. It was unnecessary for him to show any other title to them in cases where no title or discharge was alleged by the defendant when he brought his libel for them.

A number of important councils affecting the payment of

[1] *Counc. Lat.* 4. 4.
[2] Selden, 361.
[3] 13 Ed. I.
[4] per Judge Stoner in *Corbet's case*, 4 Ed. III. f. 27.

tithes were held during the reigns of the early Angevin kings. In 1175 Richard, Archbishop of Canterbury, held a great council at London, the king and his son—also king—being present[1]. A list of titheable subjects was given and the people of the province were enjoined "to pay in full their tithes. Whereas if being advised so to do they shall not have paid let them be anathematised" ("decimas integre persolvant. Quod si commoniti non emendaverint, anathemati se noverint"). And again in 1195 another council was held under Hubert Walter, Archbishop and Chief Justiciar, which among other things ordained that tithe should be paid out of the *wages* of labourers and servants. To the Councils of Lateran we shall specially refer in the next chapter. Perhaps however the most important canon of the English canon law for the payment of tithes was that passed in the year 1295 (23 Ed. I.) at a synod held in London under the great Archbishop Winchelsey[2], which endeavoured to settle an uniform custom of tithing.

We may here briefly touch upon a custom which, though not primâ facie forming part of the subject of this essay, yet is still intimately connected with the practice of tithing, and this is the custom of paying Mortuaries, which consisted of a gift claimed by and due to the minister on the death of any of his parishioners. Originally they were—like heriots in the descent of copyhold property—purely voluntary bequests. On the death of a man it was usual for a gift to be made out of his property, to the Church, as a recompense for the personal tithes he had omitted to pay during his life-time. For this purpose after the lord's heriot had been taken the second best chattel was reserved for the Church. Conscience-money, in our day, received by the Chancellor of the Exchequer is of the same character as mortuaries anciently were.

The jurisdiction which the Church had over testaments of chattels easily explains the growth of this custom into a right. By the time of Henry III. mortuaries were the necessary ingredients of wills; though the form they took varied as the custom was in different places. In many places the clergy exacted a mortuary or corse-present when any corpse was carried through

[1] Selden, p. 228—33. [2] *Vide post*, p. 48.

their parishes, the more general rule however being that mortuaries were limited to the parish in which the dead man had lived. In Wales a mortuary was due upon the death of every clergyman to the bishop of the diocese, but this was abolished and recompense given by 12 Anne, st. 2, c. 6. By the statute of Circumspecte Agatis[1] mortuaries became payable as other debts, but up to the year 1530 (circ.) they continued to be paid in kind, the parson having the right to seize the second best beast wherever he could find it. By a statute[2] then passed money payments were substituted, the amount being in proportion to the wealth of the deceased. It was also enacted that no mortuary was to be paid unless it was due by custom of the parish. An action of debt would lie under the provisions of this statute for the recovery of the amount due. By 28 Geo. II. c. 6 mortuaries were taken away in some English dioceses. The practice now has fallen into disuse, but perhaps it is represented in some parishes by the offerings of the mourners which are collected during the reading of the burial service inside the church.

[1] 13 Ed. I. [2] 21 Hen. VIII. c. 6.

CHAPTER III.

THE laxity of the administration of ecclesiastical law during the Norman period, and the conflict between the Church and the king in the reign of Henry II., account to a certain extent for the fact, that during this period, the lords of the soil were in the habit of appropriating or consecrating the tithes of their lands to whatsoever churches or religious houses they pleased. In the period between the Conquest and the end of the reign of Henry II. no less than three hundred and seventy monasteries were erected in this country, and from the year 1066 to the year 1200 nearly the whole of the appropriations of tithes were made to such bodies. An attempt was made in the year 1125 to stop this practice—by which the tithes of certain lands were made payable to houses far distant from the parish in which such lands were situate—at a *National Synod* held at Westminster it was enacted that no abbot, prior, or clergyman should receive any church-title or benefit from a layman without the consent of his bishop. But this canon was never enforced. The Church was weak, and lay patrons could afford to pay no attention to what they considered an encroachment on the rights of private property. At any rate, it is certain that the practice was for years afterwards continued, and that churches with tithes were commonly given by lay patrons without the bishop's assent or institution, both by appropriating them to religious houses and by filling them with incumbents. Such conveyances of the right to tithes in the form of a rent-charge were good according to the common law. The doctrine on the

subject is laid down in the old law books, and is recognised as good as far back as the time of Edward III.[1]. "Before the Council of Lateran," it runs, "any man might grant his tithes to what spiritual person he would[2]." This power possessed by the lords of the soil and fostered by the religious houses was used very extensively, as we have remarked, to the benefit of the latter. Tithes were conveyed to them from different parts of the country, and, in return, masses were to be sung for the souls of the departed pious donors. Sir Edward Parnynge, in the year book 7 Ed. III.[3], gives the earliest judicial authority for the practice. "In ancient times, before a new constitution made by the Pope, a patron of a church might grant the tithes within that parish to another parish." ("En auncien temps," he says, "devant un constitution de nouvelle fait per le Pape, un Patron d'un Esglise puit granter Dismes deins mesme le paroche a un altre paroche".) And some years later[4] Judge Ludlow writes, "In ancient times each man could grant the tithes of his land to what church he liked." (En auncien temps chescun home purroit graunter les Dismes de sa terre a quel Esglise il voudroit). To which is added by another judge, in abridging the case, "Quod verum est." The large number of such endowments, collected by Selden[5], shows the practice to have been as general as we have declared it to be. What constitution of the Pope, or which council of Lateran put a stop to it, has been the subject of much controversy. Blackstone[6], following Sir Edward Coke, declares that the condition of the secular clergy being rendered so poor by the system induced Pope Innocent III. to write a letter in the year 1200 to the Archbishop of Canterbury, Hubert Walter, as follows: "It has come to our hearing, that many persons in your Diocese pay their tithes in full, or two parts of them, not to the churches of those parishes in which they dwell, or where they hold their lands, and where they receive the Church's sacraments; but bestow them upon others, according to their own pleasure. Since, therefore, it seems inconvenient and contrary to reason, that churches which

[1] *Coke's Reports*, II. 44.
[2] *Hobart's Rep.* p. 295.
[3] Fol. 5, pl. 8.
[4] 44 Ed. III. f. 5, pl. 22.
[5] Selden, ch. 11.
[6] Vol. III. p. 83.

discharge spiritual functions should not reap and possess the temporalities from their own parishioners, by the authority of these presents we grant to you that you may, notwithstanding any contradiction on this, or any one's title, or any custom hitherto observed, declare the law, and effect that which you have determined upon to be steadily observed, under the censure of the Church." (Pervenit ad audientiam nostram quod multi in Diocesi tua Decimas suas integras, vel duas partes ipsarum non illis Ecclesiis in quarum Parochiis habitant, vel ubi prædia habent et a quibus Ecclesiastica percipiunt sacramenta, persolvunt: sed eas aliis pro sua distribuunt voluntate. Cum igitur inconveniens esse videatur et a ratione dissimile, ut Ecclesiæ quæ spiritualia seminant, metere non debeant a suis Parochianis temporalia, et habere; fraternitati tuæ autoritate præsentium indulgemus ut liceat tibi super hoc non obstante contradictione vel appellatione cujuslibet, seu consuetudine hactenus observata, quod Canonicum fuerit ordinare, et facere quod statueris per censuram Ecclesiasticam firmiter observari[1]). This letter being dated from the Lateran Palace was mistaken—it is said—by the chroniclers, for a decree of the Council of Lateran, held in the year 1179—80. Of it Sir Edward Coke[2] says, "At first, it bound not the lay subjects of the realm, but being reasonable and just, it was allowed of and so became *lex terræ*." There appear to have been four Councils of Lateran, held between the years A.D. 1119 and 1216, the third of which was held under Pope Alexander III., in 1179—80, and the fourth under Innocent III. in 1215—6. Selden[3] seems to think that it was at the former of these two latter councils that the practice was forbidden, or, if not, by a constitution of the Pope received in England about the time of the Council of 1215—6. Lord Selborne[4] thinks the former opinion of Selden to be the correct one. Quoting from the Acts of the Council of 1179—80, he shows how the system was recognised, and adds, "Orders were then made against the continuation of these practices; which may have caused all the ecclesiastical authorities from that time forthwith to oppose themselves to what Selden calls

[1] Inn. III. *Ep. Decret.* lib. 2. p. 452.
[2] 2 *Inst.* 641.
[3] p. 295.
[4] *Def. Ch. of Eng.* p. 135.

'arbitrary consecrations of tithes,' i.e. to appropriations by landowners at their own will and pleasure of the tithes, arising within their lordships and estates." It must be added, that to this Council of Lateran Blackstone[1] attributes the prohibition of what is known as the "infeudation" of tithes, i.e. their being granted to mere laymen. Such a practice was certainly very common on the Continent, and there is reason to believe that it existed to a very limited extent in England[2]. Whichever view is taken, it is certainly true, that landowners did make perpetual grants of tithes, both to capitular bodies, monasteries, and parish churches, and that this is the origin of the tithe endowments of the latter, so general all over the country. Further, though the Council of Lateran of 1215—6[3] is not generally considered the one to which the old law books refer, it still has its place in the history of tithe law, for by it the former appropriations to persons out of the parish were confirmed, and thus the tithes which parsons then possessed could not be appropriated afterwards to any other persons or institutions.

In many cases where a lord held land in several parishes, he would endow the church he had built near his own mansion with the tithes of the several parishes. In this way—in cases where parish churches are not the daughter-churches of some mother-church—it happens that in our own day the tithes or a portion of them in one parish are paid to the incumbent of another. In making appropriations originally, as tithes were considered merely private property, the consent of the king and ordinary was not necessary, but in the 11th century their consent became so. The following is a main outline of the form of a grant of appropriation to a capitular body. The usual mode of livery of seisin was to place the deed and a knife, or cup, on the altar of the church of the monastery, or cathedral, as the case might be. "Know that I, A. B. of —, for the soul of my father and my mother, and for myself, and my wife, and my brother, give and grant the church of, and my advowson of H, with the lands and all tithes appertaining to it, to the Dean and Chapter of the Church of —, to have and to hold to their own use, by the said

[1] *Com.* vol. III. p. 83.
[2] Seld. chap. XIII. § 1.
[3] *Corp. Jur. Council, Lat.* IV. c. XIII.

Dean and Chapter, and their successors for ever. May they be able to hold them for themselves and their successors for ever, and enjoy them without let or hindrance." (Sciatis quod ego A. B. de &c. pro anima patris mei et matris meæ et pro me et uxore mea et patris mei &c. do et concedo ecclesiam et advocationem meam de H. cum terris et decimis omnibus ad eam pertinentibus Decano et Capitulo ecclesiæ. Habend. et Tenend. &c. iisdem Decano et Capitulo et successoribus in perpetuum... immediate in suos proprios usus Tenere sibi et successoribus suis in perpetuum possint et valeant absque molestatione et impedimento &c.[1]). One of our old authorities, though the author is unable at present to cite it, states that the word *appropriation* arose from the fact that they were made "in proprios usus." It is perhaps needless to remark that the noun is derived from the adjective "appropriate," which is merely formed from the Latin *ad* and *proprius*, one's own. In such grants from the use of the word *successores* and not *heredes* arises the rule that the receiving party must be a corporation, sole or aggregate, as a natural person could not fulfil the perpetual succession. In the year 1304, it was decided by the Chancellor[2], treasurer, and all the judges and barons that appropriation of tithes is no mortmain "because tithes are purely spiritual things of which the jurisdiction belongs to the court Christian and not to this court." (Quia decimæ sunt meræ spirituales quarum cognitio ad curiam Christianitatis pertinet et non ad curiam istam.) A license in mortmain is therefore not necessary, but the consent of the king in Chancery and of the ordinary must first be obtained.

The special customs of tithing, which exist in particular places, had their origin in express as opposed to general grants from the lords of the soil, for the payment of tithes in respect of matters not generally titheable. Thus we have a Charter of Hugh Lupus[3], Earl of Chester, to the Abbey of Chester, in which he grants tithes of all the fish taken in the Dee. The customs of tithing lead and minerals in Stanhope, in Durham, have a similar origin.

[1] Jacob, *Law Dict.* 96.

[2] Prior of Worcester's case, 9 *Rep.*

[3] Sugd. *Monast.* II. 385—6.

We have observed how the practice of arbitrary conveyance of the right to tithes was put a stop to about the beginning of the 13th century. As in other attempts to stay the hand of the regular clergy, a means of evading this prohibition was soon discovered. Formerly the tithes alone were conveyed to a religious house; now the *church and the tithes* are conveyed. The monasteries in this way became possessed of a multitude of rectories, which number was increased by the rule of law, that "the advowson of the whole tithes of a parish was none other than the advowson of the Church." The duties of such "appropriated" rectories were performed by substitutes appointed by the Abbots, Abbesses, &c., to whose house the rectory had been conveyed. Such a deputy was called a Vicarius or Vicar (quasi vice fungens Rectoris). At first he was nothing more than a curate in charge and removable at pleasure, but in course of time his position became more defined and a legal right attached to it. Further, by the 15 Richard II., c. 6[1], it was enacted, that in making appropriations of rectories—which could only be done by license from the king in Chancery[2]—provision shall be made out of the tithes and profits of the benefice for the vicar and the poor and that the former must be a secular, and not a regular clergyman. It will thus be seen, that vicars obtained a portion of the tithes of the parish by prescription and endowment. By prescription the tithe was apportioned between the rector—in these cases the religious house—and the vicar. The vicar got what were called the Small Tithes, and the rector the Great Tithes. This distinction, which is purely arbitrary, seems to be based on the quantity and value of the subjects titheable. The cases decide generally to what class a subject belongs, and they do not seem to have been based on any intelligible principle. The rule of the common law is that corn, grain, hay and wood are great tithes, and that all other "prædial" tithes along with mixed and personal are small. This latter division is into three classes, viz.: Prædial, Mixed and Personal. Prædial tithes are those that arise immediately from the soil. Mixed are those that arise mediately through the increase of

[1] A.D. 1315. [2] 8 *Rep.* 11.

animals[1]. Thus corn, grain, hay, wood, fruits, herbs, &c., are of the first class, quia ex fructibus prædiorum debentur. Colts, calves, pigs, wool, milk, eggs, &c., are of the second.

Personal tithes are those which arise wholly from the labour and industry of man, as from that of millers, fishermen, &c. English law has been most concerned in the division into Great and Small Tithes. How arbitrary it is may be seen from the fact, that when the cultivation of what is usually a Small Tithe is general in a parish that has been held sufficient to turn it into a Great Tithe[2]. Further, the place of sowing has determined the class to which a subject should belong, e.g. hops sown in a garden were *small*, but in a field *great* tithes.

As a natural result of 15 Rich. II., c. 6, the monastic houses endeavoured to obtain for themselves vicarages, which had been endowed under the terms of that statute. The practice did not last long, for by the 4 Henry IV., c. 12, all appropriations of vicarages were annulled and the older statute confirmed. The secular parson had now to be ordained vicar; but the amount of his endowment was to be left to the discretion of the ordinary. In consequence of this it has happened that the right of the vicar to tithes is very different in different parishes. But in spite of the above statutes the monks still managed to obtain appropriations and became as it were immortal incumbents. The cure of souls rested with them, and the minister whom they employed was merely a stipendiary. From this practice has sprung that kind of appropriation *without a vicarage endowed;* and it is also the origin of the stipendiary curacies in which the impropriator is bound to provide divine service, which may be done by a curate not instituted but only licensed by the bishop[3].

[1] Per Macdonald C. B. in Sear *v.* Trin. Coll. Cam. Gwill. 1445.

[2] 1 Cro. 578.

[3] Duke of Portland *v.* Bingham. 1 Hagg. *Cons. R.* 157.

CHAPTER IV.

AMONG the many causes of the personal supremacy of the Tudors, not the least is the almost total annihilation of the old baronage brought about by the long and bloody wars of the Houses of York and Lancaster. The nobles of the reign of the 8th Henry were powerless to restrain or prevent the concentration of all secular and ecclesiastical power in the hands of one who had been a mere Commoner. It was this concentration of power in Wolsey that accustomed England to the supremacy which Henry achieved later through the Machiavellian policy of Thomas Cromwell. One institution after another gave way before the iron hand of the minister, until only the Church was left to offer resistance to the royal will. The schemes for religious reform propounded by the men of the New Learning were, it is true, fostered by popes and bishops, but to them the monastic houses were determinedly obstinate. The friars of the older times had degenerated into bands of beggars; the monks had become great landowners whose only anxiety was to enlarge their revenues and to diminish the number of those who could share them. Indulgence, ignorance, and waste, were rampant in their abbeys. They had, in fact, outlived the work for which they were created. The destruction that was coming upon them had already years before been foreshadowed by the suppression, in the reigns of Henry V. and Henry VI., of the alien priories whose tithes and rents were usually sent over to monastic houses on the Continent[1]. Before this,

[1] 2 Hen. V. 9 Rot. Parl. 1, and 19 Hen. VI.

Edward I. had seized their property, and his immediate successors followed his example in 1324 and 1337. Out of the property transferred by the above-mentioned statutes a number of Colleges in the Universities were founded and endowed. These were sufficient precedents for the great acts of Henry VIII., and further and above all, the independence of the religious houses, both of the king and bishops, was the only remaining bar to the fulfilment of Cromwell's policy. Two royal commissioners were dispatched to make a general visitation of the religious houses, and when their report was read in the House, the cry of "Down with them" broke uproariously from the Commons. Exaggerated no doubt as this report was, still the total suppression of the houses could not be done at once. A compromise was effected, and only those whose incomes were below £200 a year fell[1]. Three years later the larger abbeys succumbed, their sites, properties and revenues being vested in the king[2]. From these statutes arise what are known in the history of tithes as *lay impropriators*. The old rule of law was that "no layman is capable of tithes or a portion of tithes[3]," but by the above statutes the appropriations that belonged to the monasteries were given "to the king, his heirs and assigns," in as ample a manner as the abbots of the houses had held them formerly. These lands and appropriated rectories—amounting to one-third of all the parishes in England—were granted by the king to his subjects by letters patent. These persons are now called lay impropriators, and tithes to a known extent have become temporal inheritances in the hands of laymen. By the provisions of the dissolving statutes the king's patents were made sufficient in law, notwithstanding mis-recitals, and further the lands which before the Dissolution had been held discharged from paying tithes were to continue so discharged, but only as regards those of the larger monasteries, for the 27 Hen. VIII. c. 28 does not contain any such provision. Hence for such lands to be discharged the privilege, or custom, must be determined *in non decimando*. If however they had a

[1] A.D. 1536. 27 Hen. VIII. c. 27 and 28.

[2] 31 Hen. VIII. c. 13.

[3] Bp. of Winchester's case 2 *Rep.* 43, 44.

right to a Modus Decimandi, real composition, or prescription might be pleaded. To this we shall refer more fully when we come to consider the different methods of discharge. By a statute[1] of the same year the hospitals,—e.g. those of the Knights of Jerusalem,—were dissolved and their properties annexed to the crown, to be granted out in the same manner as those of the abbeys and monasteries. Again, other colleges, chapels, chantries and hospitals, &c. were dissolved, and their possessions placed at the disposal of the crown by 37 Hen. VIII. c. 24 and by 1 Edward VI. c. 14, which was the last statute for the suppression of religious houses.

Various questions have arisen as to the validity of ancient appropriations, but where there has been a vicarage and the rectory remained appropriate[2], the courts would hold that a presumption existed that all requisite circumstances were observed. This was the holding of the court in the leading case of Grymes *v.* Smith[3], tried in the year 1588. The abbot of Sulby had held the parsonage of Lubbenham, in Leicestershire. Under a grant of Henry VIII. the plaintiff claimed. The defendant had obtained a presentation of the queen, and to destroy the impropriation shewed the original instrument of it anno 22 Ed. 4 with condition that a vicarage should be endowed; and alleged that such vicarage had never been endowed, and therefore the appropriation was void. As a matter of fact there was no instrument nor evidence of the endowment of the vicarage. But as the rectory had always during the time been taken appropriate, and as a vicar had been presented and inducted and had paid his first-fruits and tenths, it was resolved that it should be presumed that the vicarage was lawfully endowed for that "omnia praesumuntur solenniter esse acta," and it would be a dangerous precedent to examine the originals of impropriations of vicarages, for that "the originals of them in time will perish." But where there was no evidence of an appropriation, only the fact of mere non-payment, no such presumption would exist[4]. It being held in 1821 that an

[1] 32 Hen. VIII. c. 24.

[2] Woolley *v.* Brownhill, M'Clel., 317.

[3] Gwil., 158.

[4] Norbury *v.* Meade, 3 Bligh, 211.

appropriation before 15 Rich. II. or 4 Henry IV. should be shown, and that if a discharge from tithes was terminated by the dissolution of the monasteries, the right of the rector revived. Even the possession of a deserted rectory, since the time of Henry VIII. by a layman's ancestors, together with the receipt of tithes was not sufficient for an appropriation to the lay patron[1]. The right of the crown under the dissolving statutes remained and the tithes went to the parson presented by the crown.

Lay impropriators, as we have seen under the dissolving statutes, must still claim tithes under Spiritual or Ecclesiastical persons, and by them they have the same rights as if they were ecclesiastical persons. Thus tithes have most of the incidents of temporal inheritances. Chief among these is the power of alienation which gave rise to what are known as Parcellers of tithes. Parcellers are proprietors of certain portions or parcels of the tithes which originally formed part of a rectory. Like the rectories of the religious houses they were granted to laymen by the king or his patentees, and since to others deriving title through them[2]. In Andrews *v.* Drever, where evidence was given of a grant from the crown in 1579 and of modern enjoyment of tithes, it was ruled that the jury might presume intermediate conveyances of the rectory between 1579 and a lease of tithes dated 1686.

By the statute 4 Hen. IV. c. 12 we have already observed it was enacted that in every appropriated church there should be ordained a vicar convenably endowed. Exemptions from this statute were allowed for particular reasons; as for instance where from the ancient documents it appeared that a chapel had immemorially existed with rites of baptism, marriage and sepulture, and chaplains to administer the services. In these cases no vicar would be instituted and endowed, but on proof by usage that the chaplain received all the small tithes the endowment became a perpetual curacy[3]. Further by 29 Car. II. c. 8, impropriators are obliged to find such curates, and some portions of the tithes are settled on them[4].

[1] Macgill *v.* Le Strange, Gwil., 815.
[2] 9 Bligh N. S. 471; 2 Bing. N. R. 1.
[3] Dent *v.* Rob. 1 Y. and Coll. 1.
[4] Bonsey *v.* Lee, 1 Vern. 247.

CHAPTER V.

AFTER the Dissolution tithes first came into lay hands as a new species of property. They were granted to laymen and their heirs, or to them and the heirs of their bodies, or for a term of years, and so were hereditaments in which estates might be holden similar to others of a separate incorporeal nature, and became tenements within the statute De Donis Conditionalibus (13 Ed. I. c. 1). Consequently the necessity of a new law to determine the character and attributes of this new property immediately arose. Most prominent was the question how were these estates to be conveyed. This was at once settled by an Act of Parliament passed in the year following that of the dissolution of the greater monasteries, which directed the same means for the conveyance of tithes as had been used for assurances of lands, tenements and other hereditaments[1]. Thus recoveries and fines of impropriate tithes and other lay ecclesiastical possessions were suffered and levied in the same way as of lands, but in order to pass them tithes must be expressly named in such assurances[2]. They are thus a particular species of property, collateral to the land, but quite distinct from it, and a specific description is requisite to pass them in conveyances. Tithes are not therefore "appurtenant to land," and a conveyance of land and its appurtenances without mentioning tithes would leave the latter in the hands of the conveyor. And so it followed that prior to the Tithe Commutation Act the owner-

[1] 32 Hen. VIII. c. 7, s. 7.

[2] Chapman *v.* Gatcombe, 2 Bing., N. C. 516; A.D. 1836.

ship of both land and tithe would not have the effect of merging the one into the other. Under the General Inclosure Act of 41 Geo. III. c. 109, s. 6[1], tithes were held to be within the meaning of the word hereditaments, which latter was said to be peculiarly applicable. By the Inclosure Acts and some local ones, many of which have been passed in the last and present centuries, provisions for allotting to owners lay and ecclesiastical lands instead of tithes have been made, and even tithes of whole parishes have been commuted for fixed money payments. On account of their spiritual nature tithes cannot lie in tenure, and hence they do not pass by copy of court roll, nor will unity of possession extinguish them. For the same reason impropriate tithes descend according to the rules of common law; and thus in Doe d. Lushington *v.* Bishop of Llandaff it was held that ancient customs[2], *e.g.* gavel-kind or borough-English, did not affect the descent of tithes, inasmuch as before the Dissolution no laymen were capable of tithes, and so there could be no ancient descent of them.

From analogy with other forms of devisable property the same rules apply to tithes; for instance, a man who is seised in fee may devise them as any other hereditaments[3], and the Wills Act of 7 Will. IV. and 1 Vict. c. 26 extends equally to them.

By the common law churchmen who had been properly inducted into their benefices and who were seised in fee enjoyed as ample a power of leasing as those seised of temporal estates, provided the consent of certain parties had been previously obtained[4]. With regard to this latter a distinction existed between ecclesiastical corporations *aggregate*, where no consent was required[5], and *sole*, where that of the patron and ordinary was necessary. This ability of leasing was altered first by what is known as the Enabling Statute 32 Hen. VIII. c. 28, where it was enacted that all leases for years or lives of any lands, tenements or other hereditaments by persons having an estate of inheritance in right of their churches shall be binding on their successors, provided certain requisites are observed. The

[1] Doe d. Watson *v.* Jefferson, 9 Moore 260.
[2] 2 New Rep. 491.
[3] Rich *v.* Sanders, Styles, 261.
[4] Co. Litt. 44.
[5] Toller 24.

Act did not extend to parsons and vicars, for by s. 4 it is expressly declared that it should not enable them to lease their tithes or other possessions otherwise than they might have done before. Of the requisites to be observed the most important were, that the lease must begin from the making; it must be either for 21 years or three lives, and of lands and tenements commonly letten for 20 years past and further the lease must be of corporeal hereditaments. By this last requisite such leases of tithes under this statute were made impossible, being as they were of an incorporeal nature. The provision however was dispensed with in 1765 by 5 Geo. III. c. 17. During the reign of Elizabeth there were several important statutes passed, not only with reference to leases of tithes[1], but also with reference to compositions, to which latter we shall refer later. The first statute, generally known as the Disabling or Restraining Statute, 1 Eliz. c. 19, prevented archbishops and bishops from making any leases or alienations of the possessions of their churches other than for the term of 21 years, or three lives, from such time as the lease, grant, or assurance shall begin, and without reserving the old or accustomed annual rent. But by a saving clause this statute did not extend to any grants made by bishops to the crown. By this clause the practice of exchanging impropriated tithes for an equal value of episcopal lands was extensively carried out. Under Henry VIII. those courtiers who had received inferior monastic lands had been able to induce him to make exchanges with the existing episcopal estates. Elizabeth by this provision in the first Restraining Statute was authorized to take into her hands, on the voidance of any bishopric, so much of the lands belonging to it as should be equal in value to confiscated rectorial tithes belonging to the crown in that diocese, and to exchange such lands for the tithes. In this way large revenues from tithes came into the possession of bishops and cathedral chapters, whilst their original estates were distributed among the queen's favourites. This practice was effectually put a stop to by the 1 Jac. I. c. 3, which extended the original prohibition of 1 Eliz. c. 19 to grants and leases made to the crown, as well as to any of its

[1] 5 Geo. III. c. 17.

subjects. The second of the Restraining Statutes, viz. the 13 Eliz. c. 10[1], makes void all leases, conveyances, &c. made by masters and fellows of colleges, deans and chapters, parsons and vicars, of tithes, other than for the term of 21 years or three lives, and whereon the accustomed rent must be reserved. This statute was explained and enforced by 14 Eliz. cc. 11—14; 18 Eliz. c. 11, and 43 Eliz. c. 29, the provisions of which however refer more to corporeal property. They make all leases by the persons mentioned in 13 Eliz. c. 10 of their property, whereof any former lease is in being and not to be expired or surrendered within three years, void. Further, all bonds or covenants tending to frustrate the provisions of the first two Restraining Statutes are likewise void. It was held in the year 1605[2] that leases void under them were so only as against successors, but remained binding during the life of the grantor. Again, a lease of tithes only for three lives rendering the ancient rent was held void, inasmuch as there was no remedy for the rent by distress or assize. "For tithes lie in prender." This rule of law was ultimately altered by a statute passed early in George III.'s reign[5]. Under it such leases for one, two, or three lives were made effectual against the lessors and their successors, and an action of debt against the lessee was given in case the reserved rent became in arrear. It must be observed that as parsons and vicars had not their leasing powers by the Enabling Statute neither were they restrained till the statutes of Elizabeth, but from henceforth[4] they were restrained from making any leases or grants other than for 21 years, or three lives with the proper qualifications, yet, such leases must be confirmed by the patron and ordinary because excepted in the Enabling Act, and because by the common law they never could bind their successors without such confirmation. Nor do they relate to rectories and tithes which have come into the hands of laymen. The impropriator in fee might lease his whole rectory or a part of it—as the tithes of a particular farm—without restraint. At common law no action for debt would lie against a tenant for

[1] S. 3.
[2] Finch's case, 2 Leon 188.
[3] Talentine v. Denton, Cro. Jac. 111; 5 Geo. III. c. 17.
[4] Wood's *Inst.* 271.

life or years for any arrears of rent, but by a statute of Anne[1] an action for debt was given to any person having rent in arrear in the same manner as if such rent were reserved upon a lease for years. It having been held that tithes are incorporeal hereditaments and lying in grant it follows that a lease of them must be by deed; and further by the Statute of Frauds[2] all greater interests in lands and hereditaments than for a term of three years must be created in writing.

Other provisions of the Restraining Statutes show still further the great zeal of Elizabeth for the thorough reformation of abuses in the Church. It had become common for patrons to present to their livings incumbents who would be glad to get hold of them on any terms. Grants of rent-charges and demises of glebe, &c. were made by such incumbents to secure annuities for the patrons who had presented them. By 13 Eliz. c. 20, ecclesiastical persons who had the cure of souls were restrained from charging their benefices so as to render them liable to the payment of pension or profit out of them, even in their own time. Instruments framed as leases but really amounting to a charge have been held void under this statute[3], and so too not only a direct charge but an agreement to charge a living falls under the same consideration. [4]By the 43 Geo. III. c. 84, s. 10, the 13 Eliz. c. 20 was wholly repealed, and so the clergy were under no restraint as to charging their benefices by mortgage or warrant of attorney. This Act was however repealed in its turn 14 years later by 57 Geo. III. c. 99, and the old Act of Elizabeth came again into operation, or at least that part of it relating to the charging of livings. Between the times of the two Acts[5] of Geo. III. grants of tithes to a trustee for securing annuities were held to pass the legal estate; and even when a vicar covenanted in case of an exchange of livings to transfer the charge to the new one[6], but did not execute the deed till

[1] 8 Anne, c. 14, s. 4.

[2] 29 Car. II. c. 3.

[3] Shaw *v.* Pritchard 10 B. and C. 241; Newland *v.* Walkin, 9 Bing. 113; Alchin *v.* Hopkins, 1 Bing. N. S. 99.

[4] Charges on benefices between 43 Geo. III. c. 84 (7th July, 1803) and 57 Geo. III. c. 99 (10th July, 1817) are valid, but all made previously to 7 July, 1803, and after 10 July, 1817, are void.

[5] Doe d. Coates *v.* Somerville, 6 B. and C. 126.

[6] Metcalfe *v.* Archbishop of York, 6 Sim. 224.

after the revival of 13 Eliz. c. 20, the court held that the covenant was a subsisting charge on the new living. A similar statute to 13 Eliz. c. 20[1] was passed in the reign of Charles I., which extended its provisions to Ireland.

This statute of Elizabeth is important, not only as it put a stop to the charging of benefices but also as it was the means of compelling incumbents to reside in their parishes. The absence of the clergy had been a scandal in the time of Henry VIII., who had himself endeavoured to put a stop to the practice. There are three Acts of Parliament which were passed during this period with the same object:

(*A*) 21 Henry VIII. c. 13.

(*B*) 13 Elizabeth, c. 20.

(*C*) 18 Elizabeth, c. 11, s. 7.

By (*A*) non-residence was punished by a fine of £10 for each offence, half to go to the king and half to the informer.

By (*B*) a year's profit of the living was confiscated by the bishop, who was to distribute it amongst the poor of the parish.

By (*C*) further means of enforcing the same penalty were provided. The bishop was to sequester the living, and if he did not do so each individual parishioner might withhold his tithes. The period which constituted non-residence was eighty days in one year.

The powers of alienation possessed by incumbents remained much the same from the time of the Restraining Statutes to the reign of William IV. There were, it is true, a number of enactments dealing with the subject during this interval, but these were more or less partial relaxations, enabling ecclesiastics and other corporations to make for certain purposes certain dispositions of their property. But during the reign of William IV., so fertile a period for the remodelling and expansion of English law, more general legislation commenced. By 6 and 7 William IV. c. 20, restrictions are made against the renewal of leases, and certain intervals made to elapse after the expiration of the old ones. However, by the 4th section of the Act ecclesiastical persons may grant certain leases conformable to

[1] 10 and 11 Car. I. c. 2. s. 7.

the usual practice, and the practice must be shown by the certificate of the archbishop of the province and the bishop of the diocese. Following this statute come 5 and 6 Victoria, cc. 27 and 108, which enable incumbents to demise their lands and corporations to grant building leases. The 14 and 15 Vic. c. 104, which is an Act for the better management of ecclesiastical and capitular estates, and does not include colleges, rectors or vicars, provides for the sale to their lessees of the reversion of their estates, provided the approval of the Ecclesiastical Commissioners is first obtained. Further provisions for leasing were contained in the Ecclesiastical Leasing Act, 1858[1], and the set of enactments was finally brought to a close by 24 and 25 Vict. c. 105 (amended by 25 and 26 Vict. c. 52), which declares it unlawful—even where customs exist—for any prebendary (not of a cathedral or collegiate church), rector, vicar, or perpetual curate who, after the passing of the Act, is possessed or entitled to any manors, lands, tenements, or hereditaments to lease or grant out the same by copy of court roll in any other way than is authorized by the provisions of the aforementioned statutes[2].

[1] 21 and 22 Vict. c. 57.

[2] 5 and 6 Vict. cc. 27 and 108; 14 and 15 Vict. c. 104; 21 and 22 Vict. c. 57, and 23 and 24 Vict. c. 124.

CHAPTER VI.

THE general substantive law of Tithe remained much the same during the two centuries and a quarter that elapsed after the reign of queen Elizabeth. In the prolific period of legislation embraced in the fourth decade of the present century, this law was placed upon an entirely different footing to what it had been in the preceding ages. "[1]The institution of Tithes though venerable from its Scriptural origin and its antiquity, and though entitled, as far as the principle of making a competent provision for the ministers of religion is concerned, to universal approbation, is nevertheless in its specific form odious to the people, and unsatisfactory to the political economist[2]. A tax, consisting of a fixed proportion of the gross produce, is open to this objection; that it takes advantage of increased fertility; while it makes no allowance for increased expenditure; and thus tends to check the spirit of agricultural improvement. It is obvious, too, that the produce of the soil cannot be collected in kind without much waste and expense to the tithe-owner; nor without danger of engendering animosities between him and his flock. It is, however, on the other hand of not less manifest importance to the Church that the legal provision for its members should be such as to secure to them upon some steady basis a competent portion of the necessaries of life, and to make them independent of any fluctuations in the value of money. It is therefore with great wisdom that

[1] Blackstone, Vol. III. p. 90. Smith's *Wealth of Nations*, III. p. 274.

[2] Paley's *Moral Phil.* Vol. II. p. 406;

Parliament has lately consented to the adoption of a plan for *commuting* the tithes of every parish into a *rent-charge*, the amount of which is to be adjusted annually according to the average price of corn." We may add that the agricultural depression during the four years previous to 1836, and the growing discontent of the agricultural tithe-payer, greatly added to the manifest necessity for some radical change in the then existing law. Several statesmen attempted the task of solving this problem, notably Lord Althorpe in 1833 and 1834, and Sir Robert Peel in 1835, the principle of whose Bill was that there should be a fixed money payment in the shape of a corn rent, in lieu of tithes, varying yearly according to the price of the corns, wheat, barley, and oats, and that it should be a voluntary arrangement between the tithe-owner and the tithe-payer. Three commissioners were to be appointed to carry out the Act. Within a month after the introduction of this Bill, the Government went out of office, but the subject was immediately taken up by its successor. Lord John Russell, who introduced the new Bill, adopted the main principles of Sir Robert Peel's plan[1]. A board of commissioners was established under the title of "The Tithe Commissioners for England and Wales[2]," which board had entire conduct of the Act. The commissioners, or assistant-commissioners whom they might appoint, had the power of examining witnesses and calling for documents, a refusal to give evidence being made a misdemeanour. The commutation was to be effected in one of two ways[3]:

(A) either by a voluntary agreement entered into by a certain proportion of the parties interested and confirmed by the commissioners[4],

(B) or by the compulsory award of the commissioners.

As regards the former the agreement of two-thirds of the landowners and tithe-owners, and as to what sum should be paid as a commutation of the small and great tithes of the parish[5], was made to bind the whole of the parish. By 2 and 3 Vict. c. 62, s. 8, such an agreement might be rectified on the

[1] 6 and 7 Will. IV. c. 71.
[2] S. 2.
[3] S. 93.
[4] Ss. 17 and 27.
[5] S. 37.

ground of fraud; and in 1842 it was decided by the Master of the Rolls of the time being that though under s. 66 the award of the commissioners was final, a claim to a portion of the rent-charge, the right to which quâ tithes had been by accident forgotten until after the agreement was made[1], might be established in the court. Valuers of the tithes of a parish were to be appointed, who had power to enter on the lands in order to effect the valuation[2].

As regards the second way, if no agreement were come to after Oct. 1st, 1838, the commissioners were to take as the basis of their commutation (but with power in certain cases to depart from it to a certain extent), the clear average value of the tithes of the parish[3]—or of the composition payable in lieu of them, wherever they had been compounded—for the period of seven years ending Christmas 1835. After the value of the tithes has been so voluntarily agreed on[4] or awarded by the commissioners, and disputes as to modus[5], &c. settled, the commissioners were to prepare a draft, stating the sum ascertained, and this amount was to be the total rent-charge[6] payable in respect of the tithes of that parish, and afterwards was to be apportioned among the lands of the parish[7], having regard to their average titheable produce and productive quality. The lands are afterwards absolutely discharged from the payment of all tithes, and instead subject to their portion of the rent-charge[8], which is payable to the former tithe-owner in two half-yearly payments. The amount of these payments is to fluctuate according to the price of corn, which is determined as follows:

Immediately after the passing of the Act, and also in January every year[9], an advertisement shall be inserted, by the Controller of corn returns, in the *London Gazette*, stating the average price of wheat, barley, and oats for the seven years ending on Thursday before Christmas-day then next preceding. By 5 and 6 Vict. c. 14, weekly returns of the purchases and

[1] Clarke *v.* Yonge, Rolls, 22 July 1842, M. S.
[2] S. 34.
[3] S. 37.
[4] S. 50.
[5] S. 46.
[6] S. 50.
[7] Ss. 38, 54.
[8] S. 67.
[9] S. 56.

sales of British corn are to be made in the different cities and towns mentioned there.

Every rent-charge is to be deemed of equal value of so many bushels of the three corns in equal quantities as would have been competent to be purchased according to the prices inserted in the aforesaid advertisement.

By section 80 of the Act any tenant paying the rent-charge "*shall be* entitled to deduct the amount *thereof from* the rent payable by him to the landlord, and shall be allowed the same in account with his landlord." It was evidently the intention of the Legislature that payment of the rent-charge should be made by the landlord, but in consequence of the wording of the clause this seldom takes place. The general practice is that the farmer in his lease or agreement agrees to pay the tithes himself to the tithe-owner, and the rent is computed accordingly. It therefore follows that the tenant pays the tithes for the landlord. If he should take the farm without making any such agreement the 80th section would come into force. Legislation was recently attempted to enforce the spirit of the Commutation Act, but the Bill fell in the slaughter of the innocents at the end of last session[1].

The power of Distraint to recover arrears of rent-charge given to the tithe-owner by the 81st section of the Act[2] introduces the anomaly that though the charge itself comes out of the landlord's pocket, yet the tithe-owner cannot bring an action against him for arrears. He has to go on the land itself, and in this way the tenant has virtually two landlords. This power was granted to the tithe-owner in consideration of the fact that landlords being often absent it would be very difficult

[1] A Bill has been introduced into the House of Lords this session (1888) by Lord Salisbury, but it is to be in effect only prospective and not retrospective. The second section after reciting section 80 of the Commutation Act declares it expedient to make that enactment compulsory as regards all *future* contracts. It is to have full effect notwithstanding any contract to the contrary, and any such contract made after the passing shall as far as it is contrary be void. Nothing in the Act is to affect the rights and liabilities of the owner and occupier of lands as between themselves under any existing contract. What the fate of the Bill will be remains yet to be seen.

[2] 6 and 7 Will. IV. c. 71.

in many cases to obtain the rent-charge from them. It will be observed that now the tithe has become *a direct charge upon the land itself*. The old definition is done away with, and tithe is no longer a part of the *increase* or produce of the land. The rent-charges are subject to all the rates and taxes to which the tithes before commutation had been subject[1]. The occupier in case he pays them may deduct the amount from the rent due next to the landlord, and the latter may recover that amount from the tithe-owner. But by a later Act[2] the rates may be assessed upon the owner of the rent-charge, and the whole or any part may be recovered from any one or more of the occupiers of the land in case they have not been sooner paid by the tithe-owner. To what rates and taxes were tithes formerly liable? They were certainly rateable to the poor as early as the first real Poor-law statute of 1601[3], where we read "to raise weekly or otherwise by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods in the said parish .... to be gathered out of the same parish, according to the ability of the same parish."

In the year 1798 the land-tax was made perpetual, but provisions for its redemption by the payment of a lump sum were contained in the Act[4]. Tithes were here expressly enumerated amongst the *real estates* upon which the tax was directed to be charged. It will be remembered that this form of direct taxation was reintroduced shortly after the Revolution in 1690, in the shape of an annual grant of about 3*s*. in the pound. A large portion of the land-tax of 1798 remains unredeemed and is annually paid to this day. Hence we find tithes, or rather the rent-charge in some parishes, still liable, where in the adjoining parish the tax has been redeemed.

The General Highway Act passed in the year 1773 enumerates the "occupier of tithes" as one upon whom the assessment is to be made[5]. The more modern Highway Acts have however

[1] 8s. 69, 70.
[2] 7 Will. IV. and 1 Vict. c. 69, s. 58.
[3] 43 Eliz. c. 2.
[4] 38 Geo. III. c. 5.
[5] 13 Geo. III. c. 78, s. 45; 5 and 6 Will. IV. c. 50.

adopted the plan of levying the rates on all property liable for the relief of the poor.

By immemorial custom the chancel of a church is repaired by the rector or impropriator[1]; but it does not seem that an impropriate rectory, having been made a lay fee by the statutes of Henry VIII., can be sequestered by the ordinary for the repair of the chancel. The parishioners were liable for the repair of the body of the church, and for this purpose church-rates used to be levied. Rectorial property was always exempted from paying them, and vicars were not charged for their tithes or glebe in a parish, because out of them they were bound to repair the chancel. Tithes, however, have been held liable for a church-rate under the general words of an Act of Parliament.

The Commutation Act further enacts that the incumbent—and note this does not apply to lay owners—may receive 20 acres in lieu of his rent-charge, the lands of the parish being then exempted. An agreement for such exchange requires the consent of the patron and the confirmation of the commissioners[2].

We have already observed that under the old law tithes existed separate and distinct from the land, and that ownership of both in the same person would not have the effect of merging the one into the other. By the Commutation Acts[3], provision is made for the *merger* of the tithes or rent-charge in the land, by which the tithes or rent-charge may at once be made to cease whenever both land and tithes or rent-charge belong to the same person. In the year 1838[4] the class of persons who had the power to merge their tithes, and which had been restricted to tenants in fee simple and in tail, was extended to those who had powers of appointment over the fee simple; and in cases where tithes and the lands charged with them are settled to the same uses, the tenant for life may cause them to merge in the land[5]. By section 4 of the same Act it was

[1] 2 *Inst.* 489.

[2] 6 and 7 Will. IV. c. 71, ss. 29, 62, 68; 2 and 3 Vict. c. 62, ss. 19, 20, 21; and 5 and 6 Vict. c. 54, ss. 6, 7.

[3] 6 and 7 Will. IV. c. 71, s. 71; 1 and 2 Vict. c. 64; 2 and 3 Vict. c. 62, s. 1; 9 and 10 Vict. c. 73, s. 19.

[4] 1 and 2 Vict. c. 64, s. 1.

[5] S. 3.

enacted that tithes could be merged in lands of copyhold tenure, doubts having been felt as to whether the Act of 1836 applied to the latter. In actual practice this merger of tithes was found to be hindered in a number of cases by the existence of incumbrances on the tithes proposed to be merged. This difficulty was removed by the second Tithe Amendment Act[1] which made any legal charge on the tithes the *first charge* on the lands in which the tithes were merged[2], and the same remedies were given against the lands as existed previously to the merger.

Finally, we may remark that the Commutation Acts provide for the preservation in the substituted rent-charge of any interest which existed previously in the tithe, and that every estate in the rent-charge shall be liable to the same incidents as a like estate in the commuted tithe. Lands previously exempted from the payment of tithes for any reason are still to remain exempted from the rent-charge. The Tithe Acts were regarded by their promoters as a final settlement of the manifest evils of the old system. The fifty years or so that have passed since their introduction show but slight prospect of the fulfilment of these wishes. A number of Amendment Acts have been passed, chiefly dealing with the alteration of the apportionments and for the redemption of the rent-charges after apportionment. 9 and 10 Vict. c. 73, s. 5 provides for the redemption of such charges where they do not amount to more than 20*s.* by the payment of consideration money, not less than 24 times the amount of the rent-charge, which is to be paid to the Governors of Queen Anne's Bounty. And in 1878 a further Amendment Act was passed providing for the redemption of the rent-charge at 25 years' purchase. in cases where land is taken for the building of places of worship, cemeteries, erection of elementary schools, or public buildings generally, including improvements under the Artisans' Dwelling Act, 1875, or under the Sanitary Acts. Orders for the redemption must, however, have been made by the Tithe Commissioners to whom the money is to be paid. By s. 4, where the rent-charge exceeds 20*s.* the commissioners may, upon the joint application of land-

[1] 2 and 3 Vict. c. 62, s. 6. [2] *Ibid.* s. 1.

owners and tenants, order its redemption at 25 years' purchase, provided the consent of the bishop and patron has been obtained, in case the person is entitled thereto by right of any benefice. The same means of redemption are provided where the land is cut up for building purposes[1]. These numerous attempts of settling the tithe difficulty by processes of redemption, &c., have not met with much success, and the problem has still to be solved by our statesmen. Active agitations are already spreading over the country for a change in the law, and more particularly in Wales, where the common cry is now that the tithes are the property of the nation and should be applied to national purposes. The Commutation Acts themselves contain the seeds of their own disparagement, not the least of which we shall see when we come to discuss what is known as the Extraordinary Tithe.

[1] S. 5.

CHAPTER VII.

BEFORE proceeding to discuss the history of the machinery by means of which the payment of tithes was enforced, it may be well to sketch briefly the gradual extension of the tithing system to all subjects until we come to the definition of tithe as "the tenth part of the *increase* yearly arising and renewing from the profits of lands, the stock upon lands and the personal industry of the inhabitants." This is Blackstone's definition[1]; but in the older law books are these additional words, "and payable for the maintenance of the parish priest by every one who has things titheable if he cannot show a special exemption[2]."

As early as the end of the 9th century it was established that corn, grain, hay and cattle are subjects upon which tithes of their increase must be paid. At a council of bishops held by Athelstan, king of all England, about the year 925[3], the king's reeves are directed to pay tithes of "yearly increase" and "living cattle." In the laws attributed to Ethelred, but which appear to have been compiled in the Norman period, we have, "Tithings of crops and of calves and of lambs" (Decimationes Frugum et Vitulorum et Agnorum), but the first list of any importance or length is in the collection of the laws, rights, and customs of his new subjects made by William I., and generally known as the laws of Edward the Confessor. We give the list in full, as it shows how in course of time, and especially during this period, the tithing system was enormously extended. "The

[1] Vol. III. p. 80.
[2] Wood's *Instit.* 161.
[3] Selden, 214.

tenth trave of all the yearly produce is due to God and therefore ought to be paid. And if any one had a herd of mares let him render the tenth foal. He who has had one mare or two for each single foal let him give a penny. Likewise he who had several cows, the tenth calf. He who has one or two for each single calf a single half-penny. And he who has made cheese let him give to God the tenth. But if he has not made cheese let him give the milk on the tenth day. Likewise the tenth lamb, the tenth fleece, the tenth cheese, the tenth churning and the tenth porker, and from bees also the tithe as convenient[1]." (De omni annona, Decima garba Deo debita est et ideo reddenda. Et si quis gregem equarum habuerit, pullum reddat Decimum. Qui unam vel duas habuerit de singulis pullis singulos denarios. Similiter qui vaccas plures habuerit, Decimum vitulum. Qui unam vel duas, de vitulis singulis obolos singulos. Et qui caseum fecerit, det Deo Decimum. Si vero non fecerit lac decima die. Similiter agnum Decimum, vellus Decimum, caseum Decimum, butyrum Decimum, porcellum Decimum. De apibus vero similiter Decima commodi.) The Councils held during the times of the early Plantagenets—some of which we have already noticed—appear to have taken this list as the foundation of their demands. In 1175, after the receipt of the epistles from Pope Alexander III., a Provincial Synod was held, at which trees and wool were added. The number of such synods, held in the succeeding years, shows that, though the object of the Church was to make every substance liable for tithes, its consummation was very difficult. The next important canon, and in fact the most important of them all, was that passed in the year 1295. The synod was held in London, and presided over by Archbishop Winchelsey. We see in it the first real distinction between praedial and personal tithes, though it had existed in the reign of Richard I. The object of the canon was to settle one uniform custom in tithing and to prevent the scandal that arose from quarrels between parsons and their parishioners. It orders[2] that tithes were to be paid on the gross value of all crops from the ground, from trees, herbs and hay; on the produce of animals, lambs

[1] Selden, 225. [2] Selden, pp. 233—6.

and wool. Expenses were not to be deducted. For six lambs or under six halfpennies were to be paid, but if there were more than seven, the seventh lamb was to be given to the rector, "who shall pay three half-pence by way of recompence to that parishioner from whom he has received that tenth" (qui tres obolos in recompensationem solvat parrochiano a quo decimum illum recepit). And so on for the eighth lamb ten halfpennies. Again, if sheep were fed in one place in winter and in another in summer, the tithe was to be divided, so if they were bought or sold in the middle of the time, and it was known from which parish they came, the tithe was to be divided: if it were not known, the Church should have the tithe in which parish the shearing took place. Tithing of milk and cheese was regulated and so was that of agistment or pasturage. Mills, bees, fisheries, &c., were also included. As regards personal tithes we may quote the canon as being one of the first in which they are strictly ordered to be paid as such. "We decree also that personal tithes be paid by artificers and merchants for instance from the profit of any business. Likewise by carpenters, smiths, plasterers, weavers and by all other workmen working for wages, to wit, to give a tenth of their wages, unless the workmen themselves prefer to give something definite towards the work and light of the church if it be satisfactory to the rector of that church" (Statuimus etiam quod decimae personales solvantur de artificibus et mercatoribus scilicet de lucro negociationis. Similiter de carpentariis, fabris, cementariis, textoribus, et omnibus aliis operariis stipendariis ut videlicet dent decimas de stipendiis suis nisi stipendarii ipsi aliquid certum velint dare ad opus vel ad lumen Ecclesiae si rectori ipsius Ecclesiae placuerit). Personal tithes were thus to be paid only of the profits, that is, after all necessary expenses had been deducted. In these Councils to which we have referred it must be remembered that laymen had no place, consequently in these Middle Ages, as the power of the Church increased, so did the list of titheable matters. Laymen paid because they were coerced into paying by the anathemas of the Church, but as was natural, sooner or later, the latter was sure to over-ride the mark. This occurred when in 1344 a canon was passed at a

Synod held under Archbishop Stratford at which was decided what wood was titheable as *silva caedua*. It had not been disputed that tithes of *silva caedua* were payable, but the question was, what wood came under that description. This Council defines *silva caedua* as wood of every description which, after the tree has been cut, grows from the root[1] (quae etinam succisae rursus ex stirpibus aut radicibus renascitur). This rule which practically made all wood titheable—except timber trees growing from seed and perhaps fir-trees, for the clergy do not appear to have ever claimed tithes of those,—was hotly opposed by the commons. In the Parliament that was being then held they petitioned against the rule on the ground that such tithe was not due by custom. An evasive answer was given to this petition and also to a similar one presented in the following year. From another, presented three years later in 21 Ed. III., it seems the claim of the clergy had been reduced to *under wood*. The matter however remained in dispute till 1372, when the Commons succeeded in limiting the power of the Canon. By the Statute known as Silva Caedua[2] it was enacted that tithe should not be exacted of *great trees*, i.e. those of 20 or more years' growth, and that should a suit be brought in any spiritual court a prohibition should be granted. No claim—it must be remembered—was ever made for tithes of timber growing from seed, so that the construction of the Statute is that no tithes should be payable for timber trees growing from the stools or roots of cut trees which were more than 20 years old. There seems to have been much dispute in later times as to whether timber-trees growing from old stools, whatever their age, were exempted by the Statute or not[3]; but in Lozon *v.* Pryse, Lord Cottenham in 1840, after examining all the authorities, came to the conclusion that trees of the growth of 20 years or upwards sprung from the roots or stools of old trees formerly cut down are within 45 Ed. III. c. 3, and therefore not titheable. In a case decided in 1825, viz., Evans *v.* Rowe, the Chief Baron and two barons had no doubt that this was the true construction had the question been unfettered by decision, but that a current of decisions in favour

[1] Selden, 237.

[2] 45 Ed. III. c. 3.

[3] Evans *v.* Rowe, M'Clel. and Y. 577.

of the contrary made it their duty to follow suit. They relied chiefly on Bibye *v.* Huxley decided in 1725[1], and Chichester *v.* Sheldon decided in 1823[2], two years previously. The Lord Chancellor in Lozon *v.* Pryse having carefully reviewed the above cases said[3], "I am now called upon to consider whether I am bound to follow the same course. I say bound because with the opinion I have formed of the original right under the Statute and the subsequent exposition of the law and the practice under it for above four centuries, nothing but feeling bound by the principles and rules upon which Courts of Justice have thought it right to act upon similar questions of discretion, could induce me to aid in perpetuating what I believe to be an error productive of the greatest injury and injustice * * * * I am therefore satisfied that I am at liberty to act upon the opinion of the law which, after a laborious examination of all the authorities, I have formed, and that the decisions are not such as to make it my duty to hold against the positive enactments of 45 Ed. III. that any gros bois or timber trees above 20 years' growth are liable to tithe." As regards other kinds of wood, e.g. pollards, apple-trees, wood in hedge-rows, hop-poles, &c., the cases have decided whether and in what way they are titheable.

By the 41st section of the Commutation Act[4] where any lands of a parish are coppices the Commissioners on notice by the land-owner or tithe-owner shall estimate the value of the tithes, having regard to the average value of the coppice-wood of the same kind cut during the 7 years preceding Christmas 1835 in that parish and the neighbouring parishes. The value so found was to be added to that of the other tithes of the parish ascertained in the manner explained before.

Agistment is a subject about which there is much uncertainty and doubt in the early cases. In the old books[5] it is defined as the pasturing of other men's cattle at a rate of so much a week, and is called so because they are suffered *giser* (*jacere* to lie down). In its legal sense Agisting means the de-

[1] Gwil. 657.
[2] 3 E. and Y. 1245.
[3] M. and Cr. 600.
[4] 6 and 7 Will. IV. c. 71. s. 41.
[5] 2 *Inst.* 643.

pasturing of the occupier of the land as well as that of a stranger. Tithes are due for the agistment on lands that have paid no tithes that year. If the pasture is used by unprofitable cattle, i.e. such as are not profitable to the parson through their milk, labour, &c. a tenth part of the value of the land was due, or at a rate of 2*s.* in the £. This is not a yearly charge, but only at that rate during the actual time of agistment.

A great number of cases have been decided on the subject of agistment tithe, e.g. whether it is due for sheep agisted in the parish after shearing time and sold in the winter, although tithe of the wool has already been paid.

Agistment tithe was long neglected, and not till the beginning of the present century generally demanded in the North of England. It was not till the early part of last century that the Courts held that agistment tithe was a *small* tithe, and so a grant to lay impropriators of tithes, not only of grain and hay, but also of herbage, did not prevent a vicar making out his title to agistment tithe in the year 1816 by showing that he alone had taken the other small tithes, although the former had not till lately been received or demanded by him or his predecessors.

Hops appear to have been introduced into this country about the time of the later Angevin kings. They certainly are mentioned in a statute of Henry VIII. and they do not seem to have been cultivated to any extent before the reign of Elizabeth. It was formerly a matter of much controversy as to how hops were to be tithed, whether by the hill, the pole, or the bushel. Lord Chief Justice Rolle tells us they ought not to be tithed before dried, but now it is decided that their tithes are to be set out by every 10th bushel after the picking and before they are dried.

The 40th and 41st sections of the Commutation Act make special provisions for the substitution of the rent-charge, and for the charge of culture of hop grounds and market gardens. The 42nd section establishes an *extraordinary* rent-charge calculated on each acre, in addition to the *ordinary* rent-charge on hop grounds, orchards, and market gardens brought into new cultivation. The history of this unfortunate section is some-

what as follows. After the introduction of the bill and before its second reading, "a deputation of Middlesex market gardeners waited upon Lord John Russell, and pointed out that they had expended a large amount of capital on the improvement of their market gardens for the last seven years, and that if they had to pay a rent-charge on the average of those years they would be liable to a heavy annual amount, whilst owners or occupiers of neighbouring land having only a small tithe composition to pay would transform their lands into gardens and thus come into competition with them, which would finally result in their ruin[1]." This argument had the desired effect, and in consequence the very principle upon which the Act was passed was violated, and incessant disputes have been the result. It was provided that the amount to be charged on hop grounds and market gardens was to be divided into an *ordinary* and *extraordinary* charge per acre; grounds ceasing to be so cultivated were to be liable only to the ordinary charge, and newly cultivated grounds to become liable to the extra-ordinary charge, but this additional charge was not to be due on the first year of cultivation, and only half of it on the second. In 1839[2] an Act was passed which extended the extraordinary tithe system to orchards and fruit plantations, but it should only apply to parishes where such charge was distinguished at the time of commutation[3]. On grounds ceasing to be cultivated for hops, market gardens, and orchards the extraordinary charge was to cease. In mixed plantations of hops and fruit trees two extraordinary charges were not to be paid, but the higher of the two for the time being was to be paid[4]. In the year 1873 market gardens were put upon the same footing as orchards under 2 and 3 Vict. c. 62, s. 27. The vicar of a Cornish parish had endeavoured to enforce payment of an extraordinary charge of 1*s.* 6*d.* per acre on 213 acres brought into new cultivation. This gave rise to an outburst of indignation which resulted in the passing of the Market Gardens Act (36 and 37 Vict. c. 42) as explained above. Ever since the passing of the first Commutation Act this extraordinary rent-charge has been a fruitful

[1] Clarke, *Hist. of Tithes*, p. 125.
[2] 2 and 3 Vict. c. 62, s. 26.
[3] S. 27.
[4] S. 29.

source of discontent. It is bad in principle and should be abolished. An attempt was made last year (1886) to deal with the subject when the Extraordinary Tithe Redemption Act was passed[1]. It does not appear to have had the successful results which were hoped for from it. It enacts that no extraordinary charge shall be charged or levied after the passing of the Act on any hop ground, orchard, fruit plantation, or market garden, newly cultivated as such under the Tithe Commutation Acts. Power is given to the Land Commissioners to fix the capital value of the extra charge payable on each farm or parcel of land at the date of the passing of the Act. The 3rd section indicates the manner in which the capital value is to be ascertained. The land is then to be charged with the payment of an annual rent-charge equal to 4 per cent. on the capitalised value of the extraordinary charge. This rent-charge is made payable half-yearly and on the days on which the former one was. Arrears are recoverable in the High Courts of Justice, or County Courts, or in the same way as the ordinary rent-charge is recoverable. The new charge is not subject to any parochial, county, or other rate, and it may be redeemed by the owner or other person interested in any land subject to it. Such redemption money must be paid to the Governors of Queen Anne's Bounty to be applied for the benefit of the incumbent if the owner be the incumbent of a benefice. Should a tenant have contracted before the passing of the Act to pay the extraordinary rent-charge to the tithe owner he shall do so no longer, but shall pay to the landlord during his tenancy the rent-charge substituted for the extraordinary charge. The landlord is thus made liable to the owner notwithstanding any previous agreement. The Ecclesiastical Commissioners are empowered to adjust the fixed charges made before the passing of the Act on the income of benefices in receipt of extraordinary tithes in favour of other benefices, or of district churches or chapelries within the parishes of which the incumbents are in receipt of extraordinary tithes. Mr Clarke, in his *History of Tithes*[2], states that there are rumours that the above Act is so unsatisfactory that it will have to be repealed. Of the other titheable

[1] 49 and 50 Vict. c. 54. [2] p. 129.

subjects which with the above were liable to praedial tithe, either by custom or at Common Law, it is needless to comment. Numberless cases fill the text books which are only interesting as showing the gradual extension of the tithing system till we arrive at the definition of tithe with which this chapter opened, viz. the tenth part of the *increase* yearly arising from the profits of lands, or of the stocks upon lands. These subjects roughly include hemp, flax, and madder; milk, eggs, wool, and the young of animals; fowls &c., and newly introduced products of agriculture, as turnips and potatoes. The original annexation of many of the former of these subjects to the list of titheable matters we have already shown in the Canons of the different Councils held during the Angevin rule.

We have already noted that in the copy of the Laws of Edward the Confessor tithes are said to be payable of mills and fish. Later in the reign of Henry II. a Pontifical Decree was sent by Pope Alexander III. (circ. 1170) to all the bishops commanding them "to compel all men under penalty of excommunication that from the produce of mills and fisheries they honestly pay the tithes to whom they were due" (Sub excommunicationis districtione compellere ut de proventibus molendinorum piscariarum * * * * decimas quibus debentur cum integritate persolvant). This decree which is now a part of the Canon Law or its substance does not appear to have been actually incorporated in the canons of the great Council held in the year 1175, and by which several of the Pontifical Decrees as to titheable matters were declared binding. Still the practice of tithing mills and fish seems to have been more or less established by the time of Henry III., and these are expressly mentioned in the canon attributed to a council of Archbishop Winchelsey, to which we have already referred. This undecided state of the law remained till the reign of Edward II., when in 1315 corn-mills more ancient than that year were by the Statute called Articuli Cleri[1] impliedly discharged from tithes. The enactment runs: "Likewise if any one has erected a mill on his estate, and after

[1] 9 Ed. II. c. 5.

the tithe of it is exacted by the Rector, the Royal Prohibition is shown in this form:—'Whereas tithes of such mill have not been hitherto paid, We Prohibit'...the answer is 'In such a case the Royal Prohibition has never issued by the wish of the Prince who decides that such a Prohibition never shall'" (Item si aliquis in fundo suo molendinum erexit de novo et postea a rectore loci exigatur decima eodem, exhibetur regia prohibitio sub hac forma:—'Quare de tali molendino hactenus decimae non fuerunt solutae prohibemus &c., et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino.' The answer is 'In tali casu nunquam exivit regia prohibitio de principis voluntate qui et decernit talem perpetuo non exire'). The construction of this statute stated above was laid down in the case of Ansell *v.* Adman[1] in the year 1701, and also it was held in 1723, if it can be proved that the mill was erected before the memory of man, or that the date is unknown, and that it never paid tithe, the Court will presume it to be within the statute[2]. It must be remembered that other mills, as paper, fulling or lead mills, are exempt from tithes unless there be a custom to pay them, or they have been paid within forty years before the passing of the 2 and 3 Edward VI. c. 13. It had always been held by the canonists that the tenth toll-dish of the corn ground at the mill should be paid as a praedial tithe, and there was great difference of opinion amongst the authorities as to whether tithe of mills was praedial, personal, or mixed. Lord Coke, although he gives his opinion that it is a personal tithe, says that in his time the question had not been judicially determined[3]. However, in 1706, upon an appeal from a decree of the Court of Exchequer[4] by which the appellants were ordered to account for the value of the tenth toll-dish, it was determined by the House of Lords that tithes of corn-mills were personal tithes only, and payable by the tenth part of the clear profits after all incidental expenses had been deducted. The decree was therefore reversed. It was also decided in this case that newly erected corn-mills, for which no tithes had been paid within

[1] Gwill. 982.
[2] Hughes *v.* Billinghurst, Gwill. 644.
[3] 2 *Inst.* 621.
[4] Newte *v.* Chamberlain, Gwill. 596.

forty years, were not within the forty years' limitation prescribed by 2 and 3 Edward VI. c. 13. Mr Eagle in summing up the law on the subject says[1]: "The result of the cases seems to be that such tithes are personal as regards the thing paid in two ways, viz. a tenth part of the clear profits, and as to the time of payment, viz. Easter under the 2 and 3 Edward VI. c. 13, but also praedial and local, first as regards the person to whom they are paid, viz. the parson of the parish in which they are situated, and secondly as not being within the forty years' limitation of 2 and 3 Edward VI. c. 13."

We have seen how the older church canons enforced the payment of tithes of fisheries. When taken out of the sea or common rivers on the principle of their being *ferae naturae*, fish are not titheable except there be a special custom to the contrary as in Wales, where a considerable number exist. By the statute just referred to[2], which was passed in 1549, tithe of fishing was made payable only in those parishes or places where it has been accustomed to be paid within the period of forty years, and this seems to apply to parishes situated on the sea coasts as well as to inland places.

Tithes of mills and fish are the last survivors of what were known as personal tithes. How and when general payment of the latter kind of tithe became obsolete will be related in another chapter. The Commutation Act[3] does not extend to tithes of fish unless by special provision to be inserted in some parochial agreement, and specially approved by the Commissioners. But by the Second Commutation Act[4] this is altered, and tithes of fish and fishing may be commuted by a parochial agreement any time before the confirmation of any apportionment after a compulsory award.

Houses and mines and wild animals, except by custom, pay no tithes[5]. The rule of law was well established in our Courts, by the beginning of the 17th century that what was not of the increase but of the substance of the earth was not liable. In

[1] p. 382.
[2] 2 and 3 Ed. VI. c. 13.
[3] 6 and 7 Will. IV. c. 71, s. 90.
[4] 2 and 3 Vict. c. 62, s. 9.
[5] Greene *v.* Hull, in 41 Eliz., and Stoutpil's case 1 E. and Y. 509.

the dark ages the Church being then all powerful did exact tithes of stones, quarries, &c., for we find that in the year 1404 the Commons presented the following bill against the practice. "Moreover the Commons pray that as many of the liege subjects of our Lord the King are often plagued and troubled by Parsons and Vicars of Holy Church by citations and censures of Holy Church for tithes of stones and slates, worked and brought from quarries, and as no tithe of such stone or slate had ever been demanded or paid that it may please the King to grant that if any Prohibition be made on the case no consultation shall be granted to the contrary" (Item priont les Commens que comme plusors lieges nostre Seignior le Roy sont souvent faites vexiz et travaillez per Persons e Vicaires de Seinte Eglise per citations et censures de Seinte Eglise pur Dismes de perres et sclattes oueres et trahez hors de quares de sicomne nul Disme de nul tiel pierre ne sclatte unques ne feust demande ne nulle Disme ent paie, que pleise a granter que si ascun prohibition soit fait en le cas que nul consultation soit grant a contrarie). Whatever was the immediate result of this we do not know, but the opinions of later Judges went to form the Common Law rule stated above. The Commutation Act[1] did not extend to mineral tithes, but provisions for their commutation were made similar to those explained with regard to fish[2].

There are large tracts of lands in different parts of the country held in severalty only during a certain period of the year, usually from February to August—Candlemas to Lammas—from which time such lands are thrown open until the return of Candlemas to such persons as have rights of common on them. These lands, called Lammas Lands, together with commons in gross, had to a great extent been liable to tithes of produce during the occupation of the occupiers, and at other times to agistment tithes for cattle feeding. The Commutation Act was found inoperative against these, but by the Second Amendment Act[3] provision is made for fixing a rent-charge on such lands and commons payable during the separate occu-

[1] 6 and 7 Will. IV. c. 71, s. 90.
[2] 2 and 3 Vict. c. 62, s. 9.
[3] 2 and 3 Vict. c. 62, s. 13.

pation, the amount of which is to be ascertained with reference to the average value of the tithes. The Act, however, does not extend to such lands where no tithes or payments instead of them have been taken during the seven years ending Christmas 1835.

In early times, as we have already explained, the tithes paid by the laity formed with other offerings a common fund distributed at his will by the bishop. When the parochial system was fully established, tithes of places which were extra-parochial were claimed and obtained by the bishop of the dioceses in which the places were situated. Their claim itself was never established at law although it is laid down as of right in the Canon Law. Basing his opinion on this law, Sir William Herle, a judge of the reign of Edward III., declared "A man cannot grant his tithes which are out of the parish to whom he likes, for the bishop of the place shall have them" (Ore ne poet home ses dismes que sont hors de parish; grant a que il voudra, car levesque del lieu les avera). "This opinion," says Lord Coke[1], "is against the law of the land, and never had allowance in it, for it is that the king shall have them." In spite of Herle's opinion in a case of the same date[2] they were adjudged to the king, and his right seems to have been resolved in Parliament as early as the reign of Edward I.[3] The sense in which this holds now appears to be this from the authorities[4], that the tithes belong *prima facie* to the crown unless they have been granted out by it or its right barred by the Nullum Tempus Act[5]. In the last cited case, which is a comparatively recent one, an attempt was made to limit the crown's right to such lands as had been parts of forests, but it did not succeed. In 1549[6] every person having cattle titheable and pasturing on any land whose parish was not known was compelled to pay the tithe of their increase to the parson or vicar of the parish in which they the owners lived. This was to remedy the frauds that were continually being practised, by which severe losses

[1] 2 *Inst.* 646.
[2] 5 or 7 Ed. III.
[3] 2 *Inst.* 646.
[4] Att. Gen. *v.* Lord Eardley, 3 E. and Y. 991.
[5] 9 Geo. III. c. 16.
[6] 2 and 3 Ed. VI. c. 13, s. 3.

were sustained by parsons from the difficulty and almost impossibility of ascertaining where the tithes of the cattle were due. By the Common Law all land was liable to the payment of tithes, so that when new land was brought into cultivation the right immediately attached. This acted in the middle ages as a great bar to the spread of agriculture. A modification however was effected by the above-mentioned Act of Edward VI.[1]; section 5 enacted that "all barren or waste ground which before this time have lain barren and paid no tithes by reason of the same barrenness and now be or hereafter shall be improved or converted into arable meadow shall after the end of seven years next after such improvement pay tithe for the corn and hay growing upon the same." The difficulty as to which parish such tithes should be paid was settled a little more than a century later[2], at least as regards what had been formerly fens and marshes, by the legislature which enacted that tithes of such lands should be paid to the tithe-owner of that parish which lies nearest to such lands. Many Inclosure and some local acts have been passed in the last and present centuries containing provisions for allotting to owners lay and ecclesiastical lands instead of tithes, and under some of them the tithes of whole parishes have been commuted for fixed money payments.

[1] 2 and 3 Ed. VI. c. 13. [2] 17 Geo. II. 2, c. 37.

CHAPTER VIII.

In our introductory chapter we traced the growth of the tithe system on the continent from originally a purely voluntary offering to a claim by the church backed by a moral and religious sanction, and then finally to a legally established system,—a law for tithe in the Austinian sense of the term. Charlemagne, about the year 787, made the first lay law decreeing the payment of tithes to the clergy. "The collection of tithes," says Milman[1], "was regulated by compulsory statutes; the clergy took note of all who refused to pay; four or eight or more jurymen were summoned from each parish as witnesses for the claims disputed; the contumacious were three times summoned; if still obstinate they were excluded from the church; if they still refused to pay they were fined over and above the whole tithe six solidi; if further contumacious the recusant's house was shut up; if he attempted to enter it he was cast into prison to await the judgment of the next plea of the crown." Such was the administrative system in the Frank Kingdom for enforcing the new tithe-law. As regards the Saxon period in the history of our own country we have no such full details. How and in what way the decrees of the Councils of Celcythe and Pincahala were enforced, we do not know. The conditions of the Danish truce contain a penalty for the withholding of tithes, and as we have already seen[2] the laws of Edgar contain very stringent measures for enforcing the payment of tithes. Cases of dispute and of those who refused

[1] Vol. II. p. 292—3. [2] Ante pp. 12 and 15.

to pay came under the jurisdiction of the Court of the Hundred. The Hundred or Wapentake was a cluster of town-ships whose presiding officer was the Hundred-Man. He called the *Hundred-moot* together and originally with a body of free-men could declare the law. Ecclesiastical and secular pleas were decided in this court. It was attended by the bishop, sheriff, and lords of the surrounding land, and appeals on questions of law would readily lie to the *Shire-moot* and from there to the king himself. The presence of the bishop or his arch-deacon was necessary for the settlement of spiritual; of the sheriff or hundred-man, of civil cases. The settlement of suits between persons of different wapentakes was made by the *Shire-moot*. In this the Bishop and the Ealdorman presided but in the absence of the latter the High-Sheriff or Viscount filled his place. Ecclesiastical causes were first tried, next those which concerned the King, and thirdly disputes between private persons.

The fusion of ecclesiastical and secular authorities in the courts lasted till the year 1085, when the Conqueror separated the spiritual from the temporal courts. The words of the Ordinance are as follows, "Propterea mando et regia auctoritate praecipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quae ad regimen animarum pertinet ad judicium secularium hominum adducant, sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit vel nominaverit veniat, ibique de causa vel culpa sua respondeat, et non secundum hundret, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat. Si vero aliquis per superbiam elatus ad justitiam episcopalem venire contempserit vel noluerit, vocetur semel, secundo et tertio; quod si nec sic ad emendationem venerit, excommunicetur, et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur. Ille autem qui vocatus ad justitiam episcopi venire noluerit pro unaquaque vocatione legem episcopalem emendabit. Hoc etiam defendo, et mea auctoritate interdico, ne ullus vicecomes aut praepositus seu minister regis, nec aliquis laicus homo, de

legibus quae ad episcopum pertinent se intromittat nec aliquis laicus homo alium hominem sine justitia episcopi ad judicium adducat. Iudicium vero in nullo loco portetur, nisi in episcopali sede aut in illo loco quem ad hoc episcopus constituerit." In this ordinance we see the origin of the ecclesiastical courts. The summary of it is, that no bishop or archdeacon should hold pleas in any of the ordinary courts, i.e. county, hundred, or sheriff's concerning episcopal laws or canons; but that every one who had transgressed the episcopal laws should be judged in such place as the bishop should appoint, and if, after being summoned three times he did not appear, should be excommunicated. And further no sheriff, reeve, or king's officer, or any layman was allowed to meddle with the administration of the episcopal laws. The bishops were thus deprived of a great privilege and their jurisdiction limited to spiritual causes. The effect of this law was not to transfer totally the settlement of disputes as to tithes to the cognisance of the bishop. For during the Norman period, that is, up to the time of Henry II., we have abundant proof that suits for tithes were settled both in the new spiritual courts as well as in the secular courts. By original suit in the bishop's court tithes were recovered and in the secular court by Prohibition. Selden gives several examples of the former[1]. In the reign of Stephen the monks of Northampton recovered two parts of tithes from Anselm de Cochis in the bishop of Lincoln's court—the bishop sitting as ordinary. Appeals to Rome from these courts appear not to have been infrequent. A tenant of land in the parish of Lenham was sued in the Archbishop of Canterbury's court for tithes by the rector of the parish. He alleged in court, "that he had been forbidden by his lord, a nobleman, William, brother of the King, from entering into any case in his absence on account of tithes respecting which the suit had been brought" (Sibi a nobili viro Willielmo fratre Regis, Domino suo, esse prohibitum ne eo absente super Decimis de quibus agebatur, causam ingrederetur). In spite of this the court proceeded and on sentence being ready to be given for the plaintiff the case was sent to Rome on the defendant's appeal. Under the first two Norman monarchs the

[1] Selden, 414.

secular courts appear to have determined *rights of tithes*. A dispute arose in the time of the second as to the tithes of some parishes in Sussex. A judgment of the Conqueror's was cited by which it was shown that they had been given to a Norman Abbey. The other disputants were therefore compelled to pay to the Abbey the profits they had appropriated to themselves. In consequence of delay in execution the King issued a writ to his chief justiciar and several other bishops, &c. to enforce it. The following writ of Henry I. taken from the Liberties of St John of Beverley, is given as an example for the Norman Period. "Henry, King of England to Osbert, sheriff of York and Gerald de Bridesala greeting—I order that you cause the church of St John of Beverley to have its tithes just as it always had them in the time of King Edward and my father, from all those lands respecting which men of the shire of York shall give evidence that they ought to have them. And whoever shall have withheld them know that I wish him to do right to God and to St John and to me" (Henricus Rex Anglorum Osberto Vicecomiti de Eboraco et Geraldo de Bridesala salutem. Praecipio vobis, ut faciatis habere Ecclesiae Sancti Iohannis de Beverlaco, Decimas suas sicut unquam melius habuit, in tempore Regis Edwardi et patris mei, de illis videlicet terris omnibus de quibus homines Comitatus Eboraci testimonium portabunt quod eas habere debent. Et quicunque detinuerit, sciatis quod ego volo ut rectum faciat Deo et S. Iohanni et mihi). The striking analogy between this writ and a *Iusticies* is remarked upon by Selden[1]. The latter writ was directed to the sheriff in some special cases by virtue of which he might hold plea of debt in his court for a larger sum than by law usually allowable. It was certainly in use in the time of Bracton[2] and the one may very well be an early form or copy of the other. By the time of Hen. II. the power of the ecclesiastical courts over ecclesiastical subjects had greatly increased, and the practice of suing for tithes in secular courts was viewed with extreme jealousy by the Church and clergy. One of the five ancient customs incorporated in the Constitutions of Clarendon (1164), and which the Church fought so much against, runs, "That the

[1] 418. [2] Bract. lib. 4.

laity, the king or others should hold pleas of Churches and Tithes and the like;" and another of the Constitutions provided that the King's Court should decide whether a suit between a clerk and a layman whose nature was disputed belonged to the Church's courts or the King's. Although the final victory in the contest between Henry and the great Archbishop rested with the King, the Church remained still powerful enough to maintain her jurisdiction over tithes, and in course of time, with the assistance of papal decrees, to make it nearly exclusive. Thus we find Alexander III. on a dispute as to tithes in which one side had appealed to him as Pope and the other to the King, writing, "For no one is allowed to appeal to the secular judge on spiritual matters" (Quoniam nemini liceat super rebus spiritualibus ad secularem judicem appellare), which even at that time was a considerable stretch both of fact and fancy.

With the increase of the power of the Church during the reigns of the early Angevin Kings a gradual ousting by the ecclesiastical courts of the jurisdiction of the temporal courts in matters of tithe took place. By the time of Henry III. the spiritual courts, or Courts Christian as they were called, had obtained the sole jurisdiction over suits between parsons and their parishioners as regards tithe where questions of customs, modus, or right did not come in. Thus we read in Fleta[1], when he is speaking of such suits, "Tithe suits should be held in the ecclesiastical court" (Decimae in quantum decimae debent in foro ecclesiastico intentari), with which Bracton, who lived in the reign of Henry III., agrees[2]. The proceedings in such cases, and which remained much the same till the jurisdiction of the spiritual courts in tithe suits was abolished by 3 and 4 Will. IV. c. 27, s. 43 in 1833, were according to the Civil and Canon Law by Citation, Libel, Answer upon oath, &c. But as regards suits between rectors, or in cases of custom or right of tithe, the temporal courts maintained, to a limited extent, their jurisdiction. The different kinds of original procedure during this period may be roughly classed as follows:

I. By the writ Indicavit and Inquest.

[1] Fleta, lib. 6, c. 37. [2] Lib. 5, de Exceptionibus, fol. 403 and ch. 10, fol. 407.

II. By the writ Indicavit and writ of Right of Advowson of Tithes.

III. By Scire Facias.

IV. By process of Command and Payment.

V. By Prohibition.

We have already shown how the parish system, which exists now in England, was of gradual growth until it reached its present form some time about the beginning of the 13th century. Disputes between the rectors of neighbouring Churches —daughter Churches which in course of time had sprung up at first dependent on the mother Church—and questions as to which of these the tithes of a certain place or portion of land were due, were naturally of common occurrence. In such suits the civil courts managed to maintain their jurisdiction. "Because a Patron may incur damage of his advowson" (Quia possit Patronus jacturam suae advocationis incurrere). The means they adopted were somewhat as follows. The clerk of one parish sues in the spiritual court the clerk of another for certain tithes received by him. Evidently should the first clerk-plaintiff win the suit, there will be a loss incurred in the value of the advowson of the clerk-defendant, the presentation to which belongs to the patron. The civil court therefore grants a writ to either of the two latter which prohibits the prosecution and holding of the plea in the spiritual court. This writ or prohibition is afterwards known by the name of *Indicavit*. Our authorities make it somewhat doubtful whether a certain portion of the tithes must be in dispute before the Indicavit will lie. Bracton doubtfully says that if the matter in dispute be less than a sixth part of the tithes of the parish, the writ will not lie, but Selden, after a careful analysis of the authorities, holds that, in these early times, i.e. before the statutes of Westminster II. and Circumspecte Agatis (13 Ed. I.)[1], it was grantable upon a suit for *any* portion of the tithes. It seems fairly well established that after these statutes not less than a fourth part of the tithes must be in dispute, though some of our authorities[2] would still refer this limitation to the

[1] A.D. 1285.

[2] Wood's *Inst.* 567.

later statute of Articuli Cleri[1] made in the year 1316. Selden quotes in support of his view the complaint of the Clergy assembled in the National Council of London held under Otho, the Pope's Legate in 1237, to correct certain proceedings, "Quae fuerunt in regno Angliae in praejudicium libertatis Ecclesiasticae," which proceeds[2], "Likewise let not the Prohibition run 'Ne judices ecclesiastici cognoscant de jure Patronatus,' but that clerks be able to sue for tithes which belong to their Churches as it were of common right. Because the patrons of the Churches or Chapels which own the tithes sued for, say that by such a petition their right of patronage is weakened and they are unwilling for the justices of our lord the King to judge what part of the tithes is or ought to be sued for before the spiritual judge" (Item ne currat prohibitio (i.e. the Indicavit) ne judices ecclesiastici cognoscant de jure Patronatus quominus Clerici possunt petere Decimas tanquam de jure communi ad ecclesias suas pertinentes. Quia Patroni ecclesiarum vel capellarum quae decimas petitas possident, dicunt per talem petitionem juri Patronatus sui derogari et nolunt justiciariis Domini Regis judicare quota pars Decimarum peti possit vel debeat coram judice ecclesiastico). Another complaint is "Likewise let not the King's Prohibition run that a rector of a parish Church may not sue those who take the tithes within the limits of his parish" (Item ne currat prohibitio Domini Regis, ne Rector Parochialis ecclesiae impetat eos qui percipiunt Decimas infra limites Parochiae suae). Again the pleading in the Abbot of Selby's case runs—and this was within six years of the passing of the statute, "Because the writ for a fourth part of the tithes began at first to have place from the time of the statute of the King at Westminster then published" (Quod breve de quarta parte Decimarum primo locum habere coepit a tempore statute regis nunc apud Westmonasterium inde editi, &c.). We may therefore take it that the Indicavit would lie against a suit for any part of the tithes. By its force the proceedings in the spiritual court were stopped. Had it the effect of removing the case to the temporal courts? The answer is, they could only take cognisance of it with the con-

[1] 9 Ed. II. c. 2. [2] Selden, 429.

sent of the two Patrons. On consent being granted—as was usual—an *Inquest* was taken. The form of procedure was an inquisition of jurors on proof made of the fact on either side when it is referred to their trial. The jurors were returned into court by the writ *Venire Facias* directed to the sheriff. Such was the course of procedure in cases between Rectors till the time of the passing of the two important statutes Westminster II. 13 Ed. I. c. 5 and Circumspecte Agatis. The latter, which originally was nothing more than a royal direction intended to settle the disputes as to the jurisdiction of secular and ecclesiastical courts, but was afterwards treated as having the force of a statute, ordains, after remarking that tithes are the most known revenue of every church, that no prohibition or Indicavit should lie where the matter in dispute was less than a fourth of the value of the tithes or advowson. The express words are "dummodo non petatur quarta pars valoris ecclesiae." The statute of Westminster II. gives in cases where an Indicavit has been sued the Writ of Right of Advowson of Tithe, by which the suit is brought into the civil courts for trial and thus takes the place of the old fashioned Inquest. To sum up then, the Writ of Indicavit is virtually a prohibition that lies to the patron of a Church whose clerk is sued in the spiritual court by another clerk for tithes that amount to a fourth of the profits of the advowson. It is directed to the spiritual judge not to proceed, for the cause now belongs to the temporal court. It has cleared the ground and the clerk-plaintiff in the original suit or his patron has merely to sue out the Writ of Right of Advowson of Tithes, after which the cause is tried and determined in the King's court. It will be observed that the Indicavit is always between four persons, viz. two patrons and two clerks, and in cases only where the subject matter is not less than one-fourth of the value of the tithes. There is, however, one exception to this latter rule, and that is in cases which concern the Crown it does not hold[1]. The writ must be brought before judgment in the spiritual court, for if after it is void. Should the part be less than a fourth, and this is surmised by the other party, he can have a Consultation which

[1] *New Nat. Br.* 66, 101.

removes the suit back to the spiritual court. The Indicavit is called so from the first important words in the writ, viz. "Indicavit mihi," &c. The particulars follow in which is recited that the clerk-defendant in the spiritual court "holds a fourth part (or more) of all the tithes issuing from, etc.....from the advowson of the Patron..... Whereas it is manifest that the said (Patron) might run the risk of the loss of his advowson of the said tithes if the said Rector succeed in that cause: We Forbid you to hold that plea in the Court Christian until it shall have been determined in our court to which of them the advowson of the same tithes belongs[1]" (tenet quartum (or more) partem omnium Decimarum provenientium de &c.....de advocatione of the Patron..... Quia manifestum est quod praedictus (the Patron) jacturam advocationis Decimarum praedictarum incurreret si praedictus Rector in causa illa (clerk-plaintiff) obtineret; vobis Prohibemus ne placitum illud teneatis in Curia Christianitatis donec discussum fuerit in Curia nostra ad quem illorum pertineat earundem Decimarum advocatio). According then as the Writ of Right[2] is afterwards tried, so must the spiritual judge give sentence.

Prior to the year 1345 the Writ of Scire Facias was grantable against prelates and clerks who took tithes after they were severed, but not against possessors of the land in three special cases which we shall briefly discuss.

First, upon the finding in an Inquest as to the title of the demandant to the tithes in question, there is reason to believe that the writ was issued. In many cases a commission was issued to determine certain facts, the proceedings being exactly in accordance with the preamble to a statute[3] passed in 1345, which declared that the Writ Scire Facias shall no longer be issued in such cases. Selden[4] gives several instances of commissions of inquiry being sent out, one of which we quote as an example. About the year 1280 a commission was sent to one Nicholas of Stapleton commanding him to inquire whether the Prior of Worksop ought to have the tithes of all the profits of

[1] Bract. Lib. 5 de Except. c. 4, fol. 403.

[2] 13 Ed. I. c. 5.

[3] 18 Ed. III.

[4] pp. 435—38.

the Manor of Gringley which had been subtracted by Henry of Alemannia. The commission returned that the Prior had the right to them by prescription, and that the said Henry had wrongfully subtracted them. "What could be more proper," says Selden[1], "than to have a Scire Facias upon the Inquisition according to the intent of the preamble of 18 Ed. III., in which Scire Facias the right might be tried between the parties, and so judgment be given." The cases however seem to refer only to tithes out of royal demesnes and immediate tenancies of the crown. The practice would evidently, had it been at all general, be sufficient for us to say that the temporal courts had jurisdiction of tithes in matters purely between a rector and his parishioners, but the view that a Scire Facias was only grantable for tithes of the royal demesnes seems to be expressly corroborated by an answer of Edward I. to a petition to him in which he distinctly refers the question to the ecclesiastical courts. Selden however is of opinion that Scire Facias might have been issuable wherever an original writ or commission had been required to settle or inquire into the right of tithes[2], and these being few and scarce, have not had any appreciable effect on the usual practice.

Writs of Scire Facias appear also to have been grantable in cases where the tithes have been granted by Patents from the crown. In 1344 we find a writ directed to the Sheriff of Essex which relates that the Churches of certain places had been granted with their tithes to the Dean and Chapter of the King's Free Chapel of St Martin's in London by Queen Maud, and that for the previous twenty years the Abbot of Colchester had taken two parts. The writ then runs[3] "And whereas we wish and are bound to maintain the rights all and singular of our free Church aforesaid, and to reclaim those which have been taken away or are illegally held, we command thee to ascertain what belongs to the Abbot now in our Chancery wherever it may be by the fifteenth day from that of St John the Baptist next; then an answer must be given to us and to the said Dean and Chapter respecting the seizures, occupation and withholding of the said two parts of the tithes as aforesaid"

[1] p. 436. [2] ib. p. 438. [3] Selden, 441.

(Et quia nos omnia et singula jura liberae capellae nostrae supradictae manutenere volumus et tenemur, et ea quae subtracta fuerint sive injuste occupata revocare, tibi praecipimus quod Scire Facias nunc Abbati quod sit in Cancellaria nostra in quindenam S. Johannis Baptistae prox. futurum ubicunque; tunc fuerit ad respondendum tam nobis quam praefatis Decano et Capitulo de usurpationibus, occupatione et detentione dictarum duarum partium Decimarum praedictarum, &c.). This writ was returned by the Sheriff with Scire Feci, and in the subsequent pleading the Abbot's council takes exception to the jurisdiction of the temporal courts and declares that the pleas should only be held "in Curia Christianitatis" since the two Churches were "in jurisdictione ordinaria Episcopi London." The court answered that where the suit was taken against them that ought to pay the tithes, i.e. in case of subtraction of tithes, the plea would be good and the cause be under the jurisdiction of the spiritual court, but not when it was brought against them that were wrongful takers of tithes. How the case was finally decided there is no record, but it seems to have been a main reason for the passing of the Statute 18 Edward III. c. 7, discontinuing the granting of such Writs of Scire Facias. The clergy had petitioned the King in Parliament complaining of the practice to which the King answered as follows[1]: "That such writs as formerly are not granted, and that the process upon such writs be abolished, and that the parties be dismissed before the secular judges of such kind of pleas, save and except our right as we and our ancestors have had and of right ought to have" (Que tielx breifs desorenavant ne soient grantes et que les proces pendant sur tielx breifs soient anentes et que les parties soient dismisses devant secular judges de tielx manner de Plees saves a nous nostre droit tiel comme nous et nous ancestres avouns eit et soloions aver de reson). This act has been generally received as a statute, but it does not appear to have ever had much force. For by reason of the saving clause, not only the King himself, but also patentees under him obtained Writs of Scire Facias in the chancery after the statute, and Selden quotes[2] such

[1] 2 *Inst.* 640 and Selden, 443. [2] p. 444.

a case which occurred within four years after the making of the statute.

We have already observed that tithes were subject to all the incidents of inheritable property, and that upon them *fines* could be levied, and Recoveries suffered just in the same way as on a manor or an advowson. It is not for us to describe the proceedings or their history in what are well known as Fines and Recoveries, we need only say here that in very early times we find Fines levied on the right of tithe in the King's Courts, not upon Writs of Covenant which in later days were in general use for the recovery of damages but in Writs of Right of Advowson. Thus in Fin. Trinit. 10 R. Iohannis before the king and his justices upon a Writ of Right of Advowson brought by an Abbess against one Henry of Abeny for the patronage of a chapel, the concord runs that the Abbess grants it to him in fee except a pension of two shillings a year to a certain church. "And by this acknowledgment and peaceful claim and by Fine and by Agreement the same Henry...has acknowledged and granted all the tithes from his demesne" (Et pro hac recognitione et quieta clamatione et fine et concordia idem Henricus .....recognovit et concessit omnes Decimas de Dominico suo). Again in the Leiger Book of the Priory of Merton there is a *Fine* before the same King between one William de Cantelupe and the Prior of Merton upon the right of advowson of a church wherein it is agreed that the chaplain of the demandants shall not take "tithes nor oblations from the parishioners of that church" (a parochianis ejusdem Ecclesiae nec in decimus nec in oblationibus), but leave them all to the parish Church. Further instances of *Fines* in the succeeding reigns might be quoted, but these are enough to show that the adoption of the incidents of inheritable property to the new property which arose after the Dissolution of the Monasteries was only an extension of what had previously existed. Scire Facias was the writ which lay upon Fines, levied upon lands &c., there is no reason therefore to suppose that it would not lie for Fines levied upon Tithes.

As in the cases of Inquests and of Writs of Scire Facias granted upon them the process of bare commandment to pay

by writ from the crown seems only to have been in force over crown lands, forests and such like. The title generally, as in the former cases, must have been by patent. The following is a writ issued by Henry III. to the keeper of the forest of Shirewood and telling him that "For the peace of the soul of King John, our father, we have granted to the Monks of Basingwork that they may take in turn up to the feast of St Michael in the 7th year of our reign tithes of the corn sown in our close between Blakebrok and Glossop; and therefore we command you to permit those Monks without any hindrance to take the aforesaid tithes" (Pro salute animae Domini Iohannis Regis patris nostri concessimus Monachis de Basingwerc quod percipiant hac vice usque ad Festum S. Michaelis anno regni nostro vii. Decimas de bladis seminatis in defenso nostro inter Blakebroc et Glossop et ideo vobis Mandamus quod ipsos Monachos hac vice sine impedimento permittatis decimas praedictas percipere). There are a number of other such writs relating to the tithes in forests of Game, Venison, &c. The latter being as a rule crown property the spiritual courts would not have jurisdiction over them. However the practice of granting such writs as well as those of Scire Facias, already referred to, appears to have ceased about the middle of the reign of Edward III.

CHAPTER IX.

WE have already referred to the means by which the civil courts in the middle ages maintained, to a limited extent, a jurisdiction over tithe suits in cases where the right of patronage was, however vicariously, invoked. The writ Indicavit which stopped the proceedings in the spiritual courts was only a particular form of another writ known by the name of a Prohibition which issued from the King's Courts on their being informed that a judge in the Spiritual, Admiralty, or Court of Chivalry was holding plea where he had no jurisdiction. It forbad the judge to proceed whether the court at law gave a remedy or not. As the determination of *Customs* has always formed part of the business of the common law it is only in consonance with first principles that such questions, even when relating to such spiritual matters as tithes have always been held to be, should also be determined by the rules of the common law, and in the common law courts. When therefore a suit was entered in the spiritual court with respect to the payment of tithes, in which the amount to be paid was determined by the custom of the parish in which the paying lands were, a *Prohibition* with the above mentioned effect at once lay. From the earliest times tithe-paying in England, though at various times enforced by Acts of the legislature, has always been more or less regulated by custom.

It is through immemorial custom that the Modus—to which we shall refer more particularly later—has been established.

In all matters, therefore, where a modus or custom of tithe-paying was in question a *Prohibition* would lie which ousted the jurisdiction of the spiritual court. This writ, which as we have seen dates back to the Norman period, was granted upon *suggestion*, i.e. representation of the matter to the court—and the latter, it may be incidentally remarked, was regulated by Magna Charta[1]—and was directed not only to the judge but also to the disputant parties. Should either of them proceed in the case an attachment could be had or an action on the case. The party prohibited might however appear, take a declaration on the suggestion and go to trial, and if it be found against the plaintiff in the Prohibition, a *Writ of Consultation* was awarded. The granting of these writs which had the effect of sending the case back to the spiritual court was first regulated in the year 1296, by what is known as the Statute of Writ of Consultations, which declared that it was to return a cause removed by Prohibition back to the ecclesiastical court when the judge found that the latter had jurisdiction or that the *Suggestion* was false. Circumspecte Agatis as we have seen had decided ten years previously in what cases Prohibitions should not lie, and though they would lie on the claim of the clergy to take tithes of matter which had not been before titheable by custom, still, in later years, the Writ of Consultation was a tremendous weapon in the hands of a powerful Church. In the dispute that raged between the Commons and the clergy in the question whether wood should be tithed according to the canon made at Stratford's Synod, the constant prayer of the Commons is[2], "That it may please our Lord the King to grant a Prohibition *without a Consultation* to those who in such a case demand it and that the said gentlemen of Holy Church be prohibited from demanding tithes of timber trees" (Que pleise a nostre Seigniour le Roy eut granter Prohibition *sans Consultation* a toux ceux que le voillent demander en tiel cas e que les dites gents de S. Esglise soient defenduz a demander Dismes de grosse bois). Again in 1404 a similar petition which we have given at length[3] against the attempt of the clergy to exact tithes of quarries of stone and slate against custom and the

[1] 9 Hen. III. c. 28. [2] Rot. Parl. 25 Ed. III. art. 37. [3] p. 58.

common law concludes, "que si ascun Prohibition soit fait en le cas que *nul Consultation* soit grant a contrarie." The ancient practice[1] in cases of Prohibition when they were granted on motion, was for the party prohibited to sue out a Scire Facias, Quare consultatio non debet concedi post Prohibitionem, in which writ the Suggestion was recited and also the Prohibition granted thereon *ad damnum* of the party, but in later years this practice was altered into somewhat as follows: upon granting a Prohibition to the Plaintiff the court bound him in a recognisance to prosecute an *Attachment of Contempt* against the Defendant for suing in a spiritual court, &c., after a Prohibition granted, and then to declare upon the Prohibition, so that he who was the Defendant in that court now becomes Plaintiff in the court above. In the Act for the Recovery of Tithes, passed in the first years of Edward VI.'s reign[2], it is enacted that in suggestions for Prohibitions in tithe suits, the suggestions must be proved to the court by two witnesses within six months after the Prohibition granted; provided the Suggestion does not contain a negative. It is needless for us to enter into any detail of the numerous cases that have been decided in our courts touching Prohibitions. We may merely mention one which shows nicely the distinction as to jurisdiction where a question of custom comes in, and which appears to have been decided about the middle of the 15th century. A parson granted to one by deed that he should be discharged of tithes of his lands, and afterwards sued in the spiritual court for them. It was held[3] that the party sued shall not have a Prohibition because he can *suggest* the matter in the spiritual court to discharge him of the tithes; but if it were upon a *Composition* made before time of memory and now the parson sues for tithe of the lands, he shall have a Prohibition against the parson.

We have already commented on the condition of the Church at the time immediately prior to the dissolution of the monasteries; then as Sir Edward Coke informs us[4], that through "the noise of the dissolution laymen taking small occasions to with-

[1] Plowd. 472.
[2] 2 and 3 Ed. VI. c. 63.
[3] Mich. 8 Ed. IV. 14.
[4] 2 *Inst.* 648.

draw their tithes" the practice of tithing, had so to speak, greatly fallen away, to such an extent that some special means were at once necessary to preserve to the parson what law and custom had held to be his due. These means were provided by the legislature in two Acts of Parliament. It was enacted by 27 Henry VIII. c. 20, that "through all the King's dominions every subject according to the ecclesiastical laws and ordinances of this Church of England, and after the laudable usages and customs of the parish, or other place where he dwelleth or occupieth, shall yield and pay his tithes," and further if a judge of the ecclesiastical court makes complaint to two Justices of the Peace (one Quorum) of any contumacy or misdemeanour committed by a defendant in any suit depending for tithes, &c., the said justices "shall commit such defendant to prison there to remain without bail till he finds sufficient surety to be bound by recognizance or otherwise, to give due obedience to the process, decrees, and sentences of the said ecclesiastical court." This Act which extends to all kinds of tithes—praedial, personal and mixed—gives relief only to ecclesiastical persons, when therefore after the dissolution, the monasteries to which tithe and parish Churches had been appropriated, were settled on the crown and afterwards conveyed into lay hands, an Act was passed[1] commanding every man "fully, truly, and effectually to divide, set out, yield or pay all and singular tithes and offerings according to the lawful customs and usages of the parishes and places where such tithes or duties shall grow, arise, or become due" and that, "if tithes and offerings are not set out and paid, the party grieved ecclesiastical, or lay, and their farmers may convene him that detains them before the ecclesiastical judge."

"But all persons that are disseised or kept from their lawful inheritance, freehold, term, right or interest in any parsonage, vicarage, pension, tithes, oblations or other ecclesiastical, or spiritual profit, which are made temporal and abide in temporal hands to lay uses by law, may have the *like remedy in the temporal courts, as for other lands and tenements.*" After sentence in the ecclesiastical court, on certificate from the judge, power was given to two justices of the peace to commit any

[1] 32 Hen. VIII. c. 7.

person, still refusing to pay his tithes, to prison. It will thus be seen that remedy is given for ecclesiastical persons before the Ordinary and for lay impropriators in the secular courts.

It will be observed too that they may sue in which court they prefer. There is no mention either of "contumacy" so that under this statute the party could not be compelled in the ecclesiastical court to give security for his obedience, but only to the *definitive* sentence where as under 27 Hen. VIII. c. 20 security could be demanded upon *contumacy* in any part of the proceedings. It is easy to see that the above acts still left open many opportunities for fraud. To remedy their defects, an important act was passed in the year 1549[1] which enacted "that every subject shall without fraud yield and pay all *praedial* tithes in kind as *hath of right been yielded* and paid within forty years before the making of this Act, or *of right and custom ought to have been paid.* And if any carries away such tithes before he hath justly divided and set forth the same, or otherwise agreed for them with the parson, &c., or farmer thereof, he shall forfeit treble value of the tithes so taken away." Again, "that at all times and as often as the praedial tithes shall be due at the tithing time of the same, it shall be lawful for the parson, &c., or his deputy, or servant, to view and see the tithe justly set forth, and the same quietly to take and carry away. And if any person carry away his corn or hay, &c., before the tithe is set forth or willingly withdraw his tithe of the same, or do stop or let the owner thereof, or his deputy or servant to view and carry away the tithes to the loss or hurt of the same, then upon due proof before a spiritual judge the party shall pay *double* the value of the tithes besides costs of suit and may be excommunicated." Section 7 of the Act enacts that, "Every person exercising merchandizes, bargaining and selling cloth, handicraft, or other art or faculty, by such kind of persons and in such places as here-to-fore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay, other than such as be common day labourers, shall yearly, before the feast of Easter, pay for his personal tithes the tenth part of his clear gains, his charges and expenses, according to

[1] 2 and 3 Ed. VI. c. 13.

his estate, condition or degree, to be therein abated, allowed and deducted"; and by section 9, "if any person refuse to pay his personal tithes in form aforesaid, then it shall be lawful to the ordinary of the diocese, where the party that so ought to pay the said tithes is dwelling, to call the same party before him and by his discretion to examine him by all lawful and reasonable means otherwise than by the party's own corporal oath concerning the true payment of the said personal tithes."

The general run of opinion and cases decided upon the above Act is briefly summed up as follows.

The sense of the words "as of right been yielded" relates to tithes in kind yielded within forty years[1]; and of the words "of right and custom" relates to a rightful custom, *de modo decimando.*

If the tithes are set out and severed from the nine parts by the owner, they are become lay chattels[2], so that if after severance, they are carried away by a stranger, the remedy against the stranger is in the temporal courts for treble the value. If the owner of the land carries them away, there is no setting forth[3]. This was decided about the year 1602 in a prohibition between Heale and Sprat. H. had set out the tithes correctly but soon after carried them away. S. sued for subtraction in the ecclesiastical court and H. pleaded that he had set them out according to the Act. It was adjudged that his carrying them away was fraud and guile under the Act.

The treble damages are to be recovered in the temporal courts by *Action of Debt*[4], because they are given *generally*, not limiting where they are to be recovered. The whole Court of Exchequer decided[5] that the forfeiture should be given to the party grieved, although no person in certain is mentioned in the Statute[6]. This is the first leading case on the point and it has ever since been held to be law. But such forfeiture cannot be demanded by executors, because the wrong was personal, and "Actio personalis moritur cum persona" and further, it is a personal contempt of the Statute.

[1] 2 *Inst.* 650.
[2] 1 Cro. 607.
[3] 2 *Inst.* 613, 649.
[4] 1 *Inst.* 159 and 2 *Inst.* 612, 650.
[5] A.D. 1587.
[6] Att. Gen. *v.* Wood.

The double value, it is to be observed[1], is to be recovered in the ecclesiastical court and is equivalent to the *treble forfeiture* recoverable in the temporal courts, because in the former court the tithes themselves can be sued for, i.e. a recompense for them plus the double value. Thus the suit in the ecclesiastical court was more advantageous, because in addition, costs could be recovered. We may here note that the two proceedings were not put on an equal footing in this respect till nearly a hundred and fifty years afterwards, when it was enacted[2] that costs should be given with the treble value in the temporal courts where the single value or damage found by the jury does not exceed twenty nobles.

The Act of Edward VI. extends only to praedial and personal tithes, but since it rehearses[3] 27 Hen. VIII. c. 20 and 32 Hen. VIII. c. 7, which extends to all kinds of tithes, it includes *mixed* tithes as well. It will be observed that in the following ways the Act limited the canon law.

(1) By that law the owner of the corn, hay, &c., had to give notice to the parson of its harvest or cutting, &c. By the common law no such notice was necessary, and the statute merely gives the parson the right of seeing the tithes set out, and does not oblige notice to be given.

(2) The canon law compelled all persons in all places to pay their personal tithes, the Act restrains it to such persons as have accustomably used to pay them within 40 years before the making of the Act[4].

(3) Labourers are freed from payment of personal tithes[5].

(4) The bishop or ordinary before the time of the Act could examine the party upon oath but after the Act he could not[6].

This taking away of the oath to prove that personal tithes were due, rendered the recovery of them almost impracticable, and supplies the reason that in course of time the practice of paying such tithes fell into disuse. We have already remarked that the only personal tithes payable at the time of the Commutation Acts were of mills and fish.

[1] 2 *Inst.* 650.
[2] 8 and 9 Will. III. c. 11.
[3] 2 *Inst.* 662.
[4] Phillimore's *Eccles. Law*, p. 1537.
[5] Ibid.
[6] Ibid.

Such was the state of the law till nearly the end of the reign of William III. when an Act was passed for the more easy recovery of *small tithes*. It was then enacted[1] in cases where the small tithes do not amount to above the yearly value of 40 shillings from any one person, "that if any person shall subtract or withdraw or fail in the payment of such small tithes by the space of twenty days after demand thereof, that then it shall be lawful for the person to whom the same are due to make his complaint in writing to any two justices of the peace within the county or place where the same shall grow due, neither of which justices is to be the patron of the church whence the said tithes arise or in any ways interested in such tithes." The justices may then summon the party in writing and after appearance or default proceed to hear and determine the complaint[2]. The case is to be adjudged in writing with costs not exceeding ten shillings against the plaintiff or defendant[3], with liberty to appeal to the Quarter Sessions[4], whose judgment shall be final unless the title of such tithe is in question. The justices have power to administer an oath to any witnesses brought before them[5], and to levy the money adjudged by distress upon refusal ten days after notice[6]. The judgment is to be enrolled and cannot be removed by writ of certiorari, &c.[7] If the defendant however sets up a *modus*, and gives security for costs and damages in the courts above, the justices shall not proceed[8]. It has been ruled[9] that he must set up the modus before the justices in the first instance, and if he neglect to do so and an order is made he cannot on appeal to the sessions give evidence of the modus[10], and the effect of the section is to take away from the justices the power of trying a question of modus in any case.

In the same year, in consequence of the refusal of Quakers to pay tithes and Church rates, an Act was passed[11] much on

[1] 7 and 8 Will. III. c. 6, s. 1.
[2] S. 2.
[3] S. 12.
[4] S. 7.
[5] S. 4.
[6] S. 3.
[7] S. 7.
[8] S. 8.
[9] Rex *v.* Jeffereys, 3 E. and Y. 1098.
[10] A.D. 1824.
[11] 7 and 8 Will. III. c. 34.

the same lines as the above for the recovery of tithes which they refused to pay. Two justices of the peace, having the same power as to oath, &c., were to determine the case, provided the amount to be recovered did not exceed ten pounds, and they could levy the money ordered to be paid by distress and sale of the offender's goods. The same provisions are made for appeal as in the former Act, but no warrant of distress can be granted till the appeal is determined. It will be observed that this Act refers to *great* and *small* tithes and is not limited like the former. Both these Acts were passed for a period of years, but the first was made perpetual by 3 and 4 Anne, c. 18, s. 1, and the jurisdiction of the justices was extended to "*all* tithes, obligations, compositions subtracted or withheld where the same does not exceed ten pounds" by 53 George III. c. 127; and the second was made perpetual by 1 Geo. I. c. 6, and the jurisdiction of the justices extended to any amount not exceeding fifty pounds by 53 Geo. III. c. 127. However by 5 and 6 Will. IV. c. 74, s. 1, proceedings for the recovery of tithes under the value of £10 (except in the case of Quakers) were to be had only under the powers given by the afore-mentioned Acts, viz., 7 and 8 Will. III. c. 6, and 53 Geo. III. c. 127, and that in the case of Quakers no suit or proceeding shall be had in respect of great and small tithes, &c., of or under the value of fifty pounds, but that all complaints touching the same shall be heard and determined under the powers and provisions contained in 7 and 8 Will. III. c. 34, and 53 George III. c. 127, provided of course that in all cases no question of title comes in. By the second section of the Act[1] in the case of Quakers no execution or decree shall issue or be made against their persons, but the plaintiffs shall have execution on their goods or other property. And in case any should then be detained in custody they are to be discharged by the sheriff, who shall issue other execution for recovery out of their property. The above Act was extended in the year 1841[2] in such a way as to take away the jurisdiction from the ecclesiastical courts of all cases where the matter involved is not above the value of £10, or in the case of Quakers of £50.

[1] 5 and 6 Will. IV. c. 74. [2] 4 and 5 Vict. c. 36.

Before proceeding to discuss the change wrought by the Commutation Acts in the means for the recovery of tithes we may remark that in addition to what has been already said that though tithes could have been recovered in the ecclesiastical court when they are admitted to be due still those courts had no jurisdiction to try the *right* to tithes, unless between spiritual persons, and they would be prohibited from trying any cases of modus or prescription. The action of debt given by 2 and 3 Ed. VI. c. 13, being a common law action, could only be brought in Courts of Common Law. Courts of Equity had also jurisdiction over tithes to the extent that they could decree an *account* and payment of tithes, where a legal right to them appears, but they could not enforce the payment of the treble or double value given by the above-mentioned statute. The ancient practice and the most general, notwithstanding the statute, was to file bills for an account of tithes, and with regard to these, Courts of Law and Equity had a concurrent jurisdiction. In the Court of Exchequer—where the clergy usually exhibited their bills for the recovery of tithes—the course of proceeding was to decree an account of tithes to the time of the filing of the bill; but in the Court of Chancery the account was carried down to the time of the master's report[1]. As regards the time in which actions could be brought it was held by all the Court as early as 1639, that the Statute of Limitations could not be pleaded in an action of debt for not setting out tithes brought under 2 and 3 Ed. VI. c. 13[2]. For the 3rd section of the former Act is confined to actions of debt grounded upon a lending or contract without specialty and to debt for arrears in rent. So likewise it could not be pleaded in bar to a bill in Equity for subtraction of tithes[3]. However this state of the law was changed early in the present century when it was enacted by 53 Geo. III. c. 127, s. 5, that "no action shall be brought for the recovery of any penalty for the not setting out of tithes, nor any suit instituted in any Court of Equity, or in any Ecclesiastical Court to recover the value of any tithes, unless such action shall be brought or such suit commenced within 6 years from the time when such tithes

[1] 2 Eagle *on Tithes*, 372.
[2] Talory *v.* Jackson, Cro. Car. 513.
[3] Marston *v.* Claypole, 1 E. and Y. 812.

became due"; and further in 1832[1] it was enacted that after the 31st December, 1833, no person claiming any tithes recoverable at law or in equity shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

We now proceed briefly to show the change in this part of our subject which was wrought by the Commutation Act. By the 81st section power is given for the recovery of the rent-charge and this power is a power of *Distress*. When the rent-charge is in arrear for 21 days after the half-yearly days of payment, the person entitled to the rent-charge after having given or left 10 days' notice with the tenant in possession, can distrain upon the *lands* liable to the rent-charge for arrears, and can dispose of the distress when taken. In fact he must "demean" himself in regard to it in the same way as a landlord taking a distress for rent, provided however that not more than two years' arrears shall at any time be so recovered. It will be noted that the distraint must be on the lands and that there is no *personal* remedy against the non-payer. This is specially declared by the 67th section where it says that nothing contained in the Act shall be taken to render any person personally liable to the payment of the rent-charge.

In case the payment has been in arrear for over 40 days and no sufficient distress appears on the land upon affidavit of the facts before the Court[2], the judge may issue a writ to the sheriff of the county requiring him to summon a jury to assess the arrears still unpaid and to return the Inquisition thereon to the court. A copy of the writ stating the time and place of execution must be left with or given to the owner of the land or his agent 10 days previous to the execution. On the return of the writ to the Court, the tithe-owner may sue out a writ of *Habere facias possessionem* directed to the sheriff, who will put him in possession of the lands which he may keep till all arrears and all costs are paid. This latter clause was necessary in order to defeat the attempts of land-owners to deprive tithe-owners of their right by leaving the lands uncultivated; this having been

[1] 3 and 4 Will. IV. c. 27, s. 43. [2] S. 82.

held[1] not to entitle them to an action for damage. The persons in possession of distrained lands have to keep perfect accounts of all expenses and profits, and by the 12th section of 5 and 6 Vict. c. 54 the owner of the rent-charge may let land taken under a writ of possession for one year in possession. Section 84 of the Act gives special remedies against Quakers whose goods may be distrained off the premises and sold without being impounded.

Under the Fourth Tithe Amendment Act[2] the notice of distraint or a copy of the writ to assess shall be considered as given or served, in case no person is found on the land, by affixing it in some conspicuous place on the land, and the previous section[3] gives a remedy to one tithe-payer, who has paid a larger contribution than he considers just, when the land charged with one amount of rent-charge has several owners or tenants, against them by summons before the Magistrates' Courts who may order payment under their hands and seals.

The remedies provided by the different Commutation Acts having often proved ineffectual in cases where the rent-charges had been charged upon land taken for railway purposes, an Act[4] was passed in 1844 extending the power of distraint over the goods, chattels, and effects of such companies, in case the rent-charge has remained unpaid for 21 days after the half-yearly day fixed for payment. And seven years later by clause 4 of 14 and 15 Vict. c. 145, when a tenant who has undertaken the payment quits without having done so, the landlord may pay the charge and recover the amount from his late tenant as if it were a simple contract debt.

[1] Rex v. Commissioners of Nene Outfall, 4 M. and R. 647.

[2] 5 and 6 Vict. c. 54, s. 17.

[3] S. 16.

[4] 7 and 8 Vict. c. 85, s. 22.

CHAPTER X.

THE history of tithe law shows that payment of tithes has been exempted or discharged in four different ways, viz., by

I. (*A*) Real Composition, or by
(*B*) Prescription de *Modo Decimandi.*
II. General prescription *de non decimando.*
III. Grant or Privilege.
IV. Unity of Possession.

I. (*A*) *Real Composition.* A Real Composition according to the old law books[1] occurs "where an agreement by deed or fine is made between the parishioners and the parson or vicar with the consent of the patron and ordinary, that certain lands shall be discharged from the payment of tithes in consideration of certain land or other real recompense for ever." A *Real Composition* and a *Modus* are in fact the same things in nature and substance, differing only in the times of their commencement. The essence of the former is that it has been made within the time of legal memory, i.e. since the beginning of the reign of Richard I.; the essence of the latter is that it was arrived at before the time of legal memory. There is reason to believe that the practice of giving land as a real satisfaction for tithes with the necessary consents existed in the reigns of the early Angevin Kings. Perhaps the first *recorded* case of such a Real Composition occurred about the year 1236. We read how one

[1] Bishop of Winchester case, 2 Rep. 43, 44, 45.

Sampson Foliot[1] brought a prohibition against Thomas, parson of Swindon, "because he had brought a suit in the Court Christian concerning his Sampson's lay fee in Draycot, etc., and the defendant pleaded that he had not brought the suit concerning a lay fee, but that he wishes to speak the truth and he declares that in fact he sued before the appointed judges for tithes of the hay of a certain meadow in Walcot within his parish of Walcot, and he seeks for nothing in the parish of Draycot, etc. And Sampson replies that his ancestors in former times granted two acres of meadow to the church of Draycot in lieu of the tithe of hay which the said Thomas sues for, and which acres in the same meadow the same church still has and since always has had, wherefore it appears that the said Thomas sues for as tithes that which is in a lay fee and that the meadow from which the said Thomas sues for as tithes is in Draicot as the writ shows and not in Walcot, etc." (quare secutus est in Curia Christianitatis de laico feodo ipsius Sampson in Draicot, &c." and the defendant pleaded that "non est secutus placitum de laico feodo sed verum vult dicere, et dicit quod revera coram judicibus delegatis petiit ab eodem decimas feni de quodam prato in Walcot infra parochiam suam de Walcot, &c. et nihil petat in parochia de Draicot, &c. Et Sampson dicit quod antecessores sui antiquitus dederunt duas acras prati ecclesiæ de Draicot, pro decima feni quam prædictus Thomas petit, et in eodem prato quas eadem ecclesia adhuc habet et semper hucusque habuit, unde videtur quod illud quod prædictus Thomas petit decimas est in laico feodo, et quod pratum illud de quo idem Thomas petit decimas est in Draicot sicut breve dicit, et non in Walcot). Whereupon several issues being joined the jury gave the following verdict, that Thomas pursued his plea "in the Court Christian concerning the said lay fee of Sampson etc. by claiming from him tithes of the said meadow in Draycot from which his ancestors gave to the church of Draycot two acres in lieu of tithe of hay and which tithe the said Thomas now sues for and which acres the said church still has and since has had" (in Curia Christianitatis de laico feodo praedict' Sampson &c. pretendo ab eo decimas of the said meadow of

[1] Mich. 25, Hen. III. Rot. 5.

Sampson in Draicot, unde antecessores sui dederunt ecclesiae de Draycot duas acras prati pro decima feni quam praedict' Thomas modo petit, et quas eadem ecclesia adhuc habet et semper hucusque habuit). Judgment is thereupon given for the plaintiff in the prohibition and that he should recover twenty marks damages. We have quoted the case fully not only on account of its historic interest as being a very early one of a Real Composition, but also as showing how the common law courts maintained their jurisdiction in matters where land and title came in, and as affording an instance of the rule that they take cognizance to the ousting of the ecclesiastical courts of cases where boundaries of parishes are tried. Speaking of such compositions Blackstone says[1], they were "permitted by law because it was supposed that the clergy would be no losers, since the consent of the ordinary, whose duty it is to take care of the Church in general—and of the patron, whose interest it is to protect that particular Church—were both necessary to render the composition effectual: and hence have arisen all such compositions as exist to this day, by force of the common law. But experience showing that even this caution was ineffectual and the possessions of the Church being, by this and other means, every day diminished, the disabling statute 13 Eliz. c. 10 was made which prevents"—1 Eliz. c. 19 having done so in the case of Archbishops and Bishops—"among other spiritual persons, parsons and vicars from making any conveyances of the estates of their churches other than for three lives or twenty one years[2]." Compositions real then are those agreements already described made after the beginning of the reign of Richard I. and before the year 1570, when the right to make them was stopped by the legislature. Although there are dicta that a composition real must have been made within the time of legal memory there is no absolute necessity for so limiting it and probably what was originally meant was that "they *may* and not that they must have originated after the time of legal memory, and before the restraining statutes[3]." When a real composition has been established the land is

[1] *Commentaries*, Vol. IV. p. 86.

[2] Ante, p. 35.

[3] Shelford *on Tithes*, p. 184.

discharged for ever from tithes both at common law and by the statutes 32 Hen. VIII. c. 7, and 2 and 3 Ed. VI. c. 13, s. 4; the latter of which expressly provides that no person shall be sued for tithes of any lands that are discharged by composition real.

In order to prove a real composition the courts have held that a deed must be produced, and where one cannot be produced some evidence must be given referring to it, and showing that it did exist independent of mere usage. Baron Wood appears to have several times insisted though unsuccessfully[1] that a composition deed ought to be presumed from length of usage and enjoyment, and Lord Cottenham seems to have held the same opinion[2]. Two reasons have been given for the rule of law stated above, viz.:

(*A*) Should a deed be presumed any bad modus might be turned into a good composition[3].

(*B*) The presumption would run counter to the maxim "nullum tempus occurrit ecclesiæ[4]."

Real compositions, as we have already seen, could not be tried in the Court Christian. If a suit were entered in the latter for tithes in kind, a prohibition would issue to remove it should a composition be pleaded; though of course suits for the amount of the composition itself could be brought in the ecclesiastical courts.

As in other matters well known to the student of our legal history, the Court of Equity exercising its jurisdiction as a Court of Conscience took upon itself to over-ride the express enactments of the legislature; so with regard to real compositions in many cases it confirmed them though made since the passing of the disabling statutes, where they were done with the consent of the ordinary and patron and seemed to be for the benefit of the Church. However, about the year 1780—although an analogous case had been decided in the same way in 1765, the Court of Chancery adopted a more reasonable

[1] Bennet *v.* Skeffington, 3 E. and Y. 827. Bennet *v.* Neale.

[2] E. and Y. 630. Ward *v.* Shepherd, 3 E. and Y. 795.

[3] Heathcote *v.* Mainwaring, 2 E. and Y. 366.

[4] Ward *v.* Shepherd, ibid. 795.

rule[1], to the effect that a decree in equity confirming an agreement for the acceptance of land for tithe made since the 13 Eliz. c. 10 was not binding on the succeeding incumbent. However by the Modus and Exemptions Act of 1832[2] it was enacted that every composition for tithes which had *then* been made or confirmed by the decree of a court of equity in England, in a suit to which the ordinary, patron and incumbent were parties, and which had not since been set aside or departed from, should be valid in law.

We have already observed that by Inclosure or other private Acts of Parliament, many permanent compositions for tithes have been established, and we may add that the rule of the restraining statutes applied only to ecclesiastical persons or corporations, for lay impropriators have full power to enter into what compositions they please.

(*B*) *Modus Decimandi.* A prescription by de modo decimandi, or commonly a "modus decimandi is," says Blackstone[3], "where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase," as for instance two pence per acre for the tithe of land; or it may be a compensation for labour, as the twelfth hay-cock in consideration that the owner makes it for the parson; or again a couple of fowls in lieu of tithe of eggs. In short any means by which the general law of tithing is altered and a new method established is called a modus decimandi. It has been long a rule of law[4] that rights founded on custom or prescription must have existed from time whereof the memory of man was not to the contrary, which was understood not merely of living memory, for if there were sufficient proof by any record or writing to the contrary, although it exceeded the memory of any one living yet it was *legally* within the memory of man. This period called "legal memory" as distinguished from the memory of man or living memory by equitable construction of the Statute of Westminster I. was made to commence from the first year of

[1] Jones *v.* Snow, 3 Gwill. 1199, and 3 E. and Y. 1291.

[2] 2 and 3 Will. IV. c. 100, s. 2.

[3] 2 Black. *Comm.* 29.

[4] Coke Litt. 115 *a*.

the reign of Richard I. A.D. 1189. Accordingly then as moduses are either customary or prescriptive they are supposed by the law to have commenced before the year 1189, and are in fact real compositions arrived at before that date. The distinction however between them is shown, in that a modus is presumed to have commenced by deed, but it is not necessary to produce that deed, inasmuch as after a constant annual payment in lieu of tithes from time immemorial or time out of mind, a legal commencement will be presumed[1].

As we have before remarked the determination of questions of modus belonged to the temporal courts, which always granted prohibitions *de modo decimandi* in case a suit for tithes had been brought in the spiritual court, and a modus-plea set up. The latter court it is true could enforce payment of the amount of the modus (allowed) for it is expressly stated in Circumspecte Agatis, "and if a Rector sues against his parishioners for offerings and tithes due by law or by custom...the spiritual judge has jurisdiction notwithstanding a royal prohibition" (et si rector petat versus parochianos oblationes et decimas debitas vel *consuetas*.....judex ecclesiasticus cognoscere regia prohibitione non obstante). Speaking of this Act Lord Coke remarks[2], that since *consuetas* is used modus decimandi, real composition or by custom or prescription is established, "for we have decimas debitas and decimas consuetas, and that is a duty, &c., in satisfaction of tithes as a yearly sum of money or other duty... and the parson may sue in Court Christian and is warranted by the Act." The record of the succeeding ages is still a constant endeavour on the part of the Church to obtain jurisdiction for her courts over the right of tithes and the customs of paying them.

Even in the early part of the reign of James I. we find a determined attempt in a series of articles by Richard Bancroft, Archbishop of Canterbury[3]. Upon these articles all the judges and barons of the exchequer drew up resolutions which, though they were never made part of the law, still are "resolutions of the highest authorities in law." Speaking of the action of the

[1] 13 Rep. 43.

[2] 2 *Inst.* 490.

[3] Articuli Cleri, 3 Jac. Regis. 2 *Inst.* 649.

clergy in attempting "to work in the spiritual courts more commodity instead of being content with what was usually paid," Answer 15 says, "but now they grow so troublesome to their neighbours, as, were it not for the prohibition (as may appeare by the presidents before remembred) they would soone overthrow all prescriptions and compositions that are for tithes, which doth and would breed such a garboile amongst the people as were to be pitied and not permitted. And where they say there bee many statutes that take away these proceeding from the temporall courts, they are much deceived; and if they look well into it, they shall find even the same statutes (they pretend) to give way to it. And it is strange they will affirme so great an untruth, as to say, they are not permitted to traverse the suggestion in the temporall court, for both the law and daily practice doth allow it"

As in the case of a composition real the 2 and 3 Edward VI. c. 13 provides that no person shall be sued for tithes of lands which "by any privilege or proscription are not chargeable."

The very numerous cases respecting moduses that fill our reports show them to have been a subject of unending litigation. It is beyond the scope of this Essay to enter into any historical analysis of them, we shall merely note as briefly as possible a few of the leading rules which the courts have established. In the first place moduses are either customary or prescriptive[1]. A customary modus is one which extends over a hundred, parish, township, or hamlet, and so covers all the lands in the district, but which exists in notion of law independent on the lands; whilst a prescriptive modus is confined to a particular farm or quantity of land and so can no more exist without certainty in the lands than a shadow without its substance. The law has established many distinctions necessary for the proof of these different kinds of moduses which it is unnecessary for us to enter upon. The following rules appear mostly to have been established by the end of the 16th century in our courts.

(1) A modus must in its origin have been beneficial to the parson and not to third persons only. Thus in Elizabeth's reign it was decided[2] that a modus to find straw for the body of

[1] Degge, 353—4.

[2] Scory v. Barber, Gwill. 163.

the church was invalid because the parson is not bound to find it; though the case would have been different had it been to find straw for the chancel.

(2) It must be something different from the thing compounded for[1]. Thus one load of hay in lieu of all tithe hay is not a good modus because the law presumes that no parson would take less than is his by right and the number of modus-cases appears to confirm this view.

(3) It must be something as *certain* and *durable* as the tithe though it may not be so valuable, or in legal language it must not be a desultory or *leaping* modus as that could not have been settled from time immemorial. The leading case upon this is Startupp *v.* Dodderidge[2], decided in the year 1706, which more particularly refers to a modus regulated by the value or improved yearly rent of land. In this it was decided that a custom to pay 2*s.* in the pound of this true improved yearly rent of the land was void, not only on the ground of uncertainty but also that the lands might be unlet, underlet, or overlet. Here we come upon the doctrine of *rankness*. The same case is a leading one on this point also. It finally decided that

(4) A modus must not be too large, i.e. a *rank-modus*, or variable, as if the tithes be worth £60 per annum a modus of £40 cannot be established though one of 40*s.* might be good. The reason for this is that the presumed original composition was an equitable contract in which the full value of the tithes was given at the time of making. The time of making is taken as we have said as being prior to the reign of Richard I., and it is manifest that the present value of such a modus greatly exceeds the value of the tithe at that period. This doctrine is therefore a mere rule of evidence and not of law and the modus is in point of evidence *felo de se* and destroys itself. The question is really one of fact to be tried by a jury, and rankness is only evidence against the immemoriality of the payment. As an instance of a modus bad through rankness we may take the following supposititious case. If the tithe-charge upon 6

[1] Penrose *v.* Shepherd, 1 E. and Y. 448.

[2] 11 Mod. 60, 1 E. and Y. 666, Gwill. 587.

acres of meadow-land amounts in a year to 18*s.*, a modus of 1*s.* 6*d.* an acre would be *rank* because since a modus is invariable (generally) 1*s.* 6*d.* was evidently much more than the value of the tithe at the beginning of the reign of Richard I. Distinctions have it is true arisen on the question of rankness between farm payments and those for particular species of produce, but it is unnecessary for us to touch upon them here. On the question of variability the cases generally refer to tithes of occupied houses. Thus in Elizabeth's reign the court decided against a modus[1] by which time out of mind the occupiers of farm houses on one side of a road had paid 3*d.* a year, and those on the other side 2*d.* The reason for this is that houses may become uninhabitable through decay, &c., and so the payment would cease. The argument however did not apply to a modus to be paid by the *inhabitant householders* within a town or village[2], as it is not to be contemplated that a town or village could ever be wholly without inhabitants. The above at least seems to be the distinction deducible from the cases.

(5) A modus for one species of titheable subjects does not discharge payment of tithes in full of another species[3]. This rule though decided by the judges in Elizabeth's reign is confirmed by the leading case already mentioned[4]. Thus a modus of one penny for every milch cow will discharge the tithe of milk kine but not of barren cattle.

A modus may in several ways be discharged and the tithes again become payable in kind, as for instance by the removal, alteration or destruction of the thing for which it was paid[5], e.g. a modus for hay or grass is destroyed or rather suspended when the land is converted into hop-gardens, though it will revive should the lands be again cultivated for hay. It is also said[6] that it may be lost by frequent payment of tithes in specie, but the following case decided by the Judges about 1601 seems to point the other way[7]. In a prohibition between Nowell and Hicks, vicar of Edmonton, the plaintiff alleged a custom, time

[1] Perry *v.* Soam, 1 E. and Y. 96.

[2] Bennet *v.* Read, Gwill. 1272. Travis *v.* Oxtan, ib. 1066.

[3] Grysman *v.* Lewis, Cro. Eliz. 446.

[4] Startupp *v.* Dodderidge, ante, p. 93.

[5] 1 Roll. Abr. 651, l. 35.

[6] Com. Dig. Dismes (E. 20).

[7] 2 *Inst.* 653.

out of mind, of paying one penny for every lamb. The jury found that before the twenty years last past there was such a custom, a modus decimandi; but in the last 20 years, by reason of suits and troubles, the inhabitants had paid lambs in kind. The judges held that[1]:

(1) "When a custom doth create an inheritance this cannot be waived or adnulled by payment or other matter *in pais;*

(2) Albeit that the modus had not been yielded or pay'd for 20 years, yet the prescription may be general and that the custom once established doth continue."

Under the provisions of a late statute all persons may in certain cases claim exemption from tithes, in respect of *long usage*, that is when the usage can be shown to have lasted for a certain period of time. This is a principle entirely new to the common law, which never recognised a modus that had not existed immemorially, and allowed no total discharge from tithes by force of any custom or prescription whatever—except in the case of spiritual persons—thus maintaining inviolable the old maxim[2], "modus de non decimando non valet." The statute which introduced this new principle was passed in 1832[3] (amended a year after[4]), in which it is provided that[5] when tithe is demanded by any lay person not being a corporation sole, or by any corporation aggregate, any modus or total discharge set up in answer to such claim shall be deemed valid, upon evidence showing an usage in support of it for thirty years; unless it can be met by evidence that such usage has been by virtue of some agreement in writing; or that before the thirty years the usage was different. And that a modus or discharge so set up in answer shall be deemed indefeasible, upon evidence showing an usage for as much as 60 years in support of it; unless it be proved to have been by virtue of some agreement in writing. And further, that when tithe is demanded by any bishop, parson, or other corporation sole (spiritual or temporal), any claim of modus in discharge shall be valid and indefeasible, upon evidence of usage during the whole

[1] 43 and 44 Eliz.
[2] Wright *v.* Wright.
[3] 2 and 3 Will. IV. c. 100.
[4] (3 and 4 Will. IV. c. 83.)
[5] S. 1.

time that two persons in succession shall have held the benefice or office, and for 3 years after the institution or appointment of a third person thereto; unless it shall be proved that such usage was by some agreement in writing. Provided however that[1] if the whole time of the holding of such two persons shall be less than 60 years, then it shall be necessary to show such usage not only during the whole of such time, but also during such further period as shall with such time make up the full period of 60 years and the further period of 3 years aforesaid.

II. *De Non Decimando.* A custom or prescription De Non Decimando is to be discharged absolutely of tithes and to pay nothing in lieu thereof. It has always been the rule of the common law—in accordance with the maxim, "ecclesia decimas non solvit ecclesiae"—that all ecclesiastical and spiritual persons and bodies, as bishops, abbots, priors, deans and chapters, parsons and vicars, and the king as being a *persona mixta*, are capable of prescribing in non decimando without being required to give any positive proof of the origin of the discharge, or to adduce any other evidence of title than usage and enjoyment from time immemorial. But a layman cannot prescribe in non decimando, not even lessees of the ancient demesnes of the crown[2], unless he derives it from a spiritual person, as for example in the case of the lands in the hands of laymen which belonged to the religious houses dissolved by Hen. VIII. As examples of prescription *in non decimando* we may take the following. A bishop may prescribe that he and all his predecessors seised of a certain manor in right of his bishopric have held the manor by them and their tenants discharged of tithes, and it was decided in Elizabeth's reign[3] that copyholders of inheritance of a spiritual person may have a similar prescription, for the court will presume that the tithes were discharged before the creation of the copyholds. Attempts have been made in the courts[4] to uphold a prescription for the lords of manors to pay certain sums of money to the parson in lieu of tithes and for them to take the tithes themselves. The

[1] S. 1.
[2] 1 Cro. 511.
[3] 1 E. and Y. 149.
[4] Pigot *v.* Heron, 1 E. and Y. 135. Pigot *v.* Simpson, ib. 148.

authority however is very strong against such prescriptions[1]; for if it could be legally done it would make the right to tithes assignable from one layman to another, and would make a layman capable of tithes in gross. The old law books state that though a parish or particular hamlet cannot prescribe *in non decimando*, yet a county, wild, or hundred, or any well-ascertained district, may have such a privilege for things *titheable by custom*. It is even stated positively by Lord Coke in the Second Institute[2] that a county may prescribe to be quit of any *other* tithe.

It must be remembered that where cases concerning prescriptions *in non decimando* could be brought within the Modus Act[3] and its Amendment, its terms would apply[4].

III. *Grant or Privilege.* Lands may be totally discharged from the payment of tithes by privilege or by Act of Parliament. All abbots, priors, and other heads of monastic houses were originally subject to the payment of tithes, until Pope Paschal II. exempted the religious houses from paying them in respect of lands in their respective possession, or as it was expressed, "quam diu propriis manibus excoluntur[5]." About the year 1160, Pope Adrian IV. limited this exemption to the three orders—known generally as the privileged orders—of Cistercians, Templars and Hospitallers, in respect of lands that were then in their own management. This privilege was confirmed by the canons of the last General Council of Lateran held in the year 1215, and was allowed by the general consent of the realm as part of the law of the land[6]; but it extended only to lands which they had before the date of the council. Lord Coke informs us[7] that Pope Innocent III. by his bull discharged the Premonstratenses from payment of tithes of such lands as were of their own manurance, but the cases decided in the courts[8] go to show that the privilege did not extend to this

[1] Phillips *v.* Prytherick, 3 E. and Y. 1273. Knight *v.* Marquis of Waterford, 4 Y. and Coll. 328.

[2] 645, 610, 611.

[3] 2 and 3 Will. IV. c. 100.

[4] 3 and 4 Will. IV. c. 27.

[5] 2 Rep. 44 b.

[6] 2 *Inst.* 652.

[7] *Ibid.*

[8] Dickenson *v.* Greenhill, 1 E. and Y. 332. Bradshaw *v.* Clifton, 3 E. and Y. 1231. Townley *v.* Tomlinson, Gwill. 1004.

order, and consequently a title to hold lands discharged from the payment of tithes either absolutely or while in the manurance of the owners of the inheritance cannot be derived under that order. After the passing of the statute De Viris Religiosis in 1279, which gave a terrible blow to the monastic bodies, the privileged orders endeavoured to obtain by purchase or otherwise bulls of exemption from tithes from the Pope for their lands let to farmers, and also for the lands acquired by them since the time of the above-mentioned Council of Lateran. These bulls having the force of law by the Canon Law were allowed in actions for tithes which, as we have already shown, were brought in the spiritual courts. However in the year 1400 this method of evasion was put a stop to by the 2 Hen. IV. c. 4, which subjected not only Cistercians, but all other religious and secular bodies which put any bulls in execution for discharge of tithes of their lands, to the danger of a *praemunire*. The Statute of Praemunire[1], which was passed in A.D. 1393, as a supplement to that of Provisors which had stopped appeals to the Court of Rome, rendered persons or bodies who put papal bulls, excommunications, &c., in execution, in causes whereof the cognisance belonged to the King's Courts, liable to forfeiture of their lands and goods, and also to imprisonment. The Act of Henry IV., it will be noticed, created only a penalty for using such papal instruments, which were not made void and of none effect till the time of the dissolution of the monasteries, when this was done by the 28 Hen. VIII. c. 16. The effect of the dissolving statutes on the lands of the privileged orders will be considered presently. We must however remark that the object for which the Templars' order had been called into existence having ceased the order was dissolved in the reign of Edward II., and their lands were given to the prior of the Hospital of St John of Jerusalem.

IV. *Unity of Possession.* Lands might have been discharged from tithes by Unity of Possession, as when the rectory of a parish and lands in the same parish both belonged to a religious house, but only whilst such unity of possession continued. The requisites for such exemption which were laid

[1] 16 Rich. II. c. 5.

down in the Archbishop of Canterbury's Case, decided in the 38th year of Elizabeth and in a few other cases, were as follows:

(*A*) The union must have been founded upon legal title;

(*B*) And equal with respect to the quantity of estate;

(*C*) The lands must have been free from the payment of any tithes in any manner, and freedom and possession must have existed immemorially and must not be presumed[1].

The exemptions enjoyed by lands belonging to religious houses under the above-mentioned circumstances being *personal* would have fallen with the houses at the dissolution and the lands become again titheable had not they been supported and continued by Act of Parliament. The statute 31 Hen. VIII. c. 13, s. 121, in dissolving the *Greater Abbeys* declared that the king and his patentees, or all and every other person, their heirs and assigns, who had or should have any lands &c. belonging to the monasteries and other houses should keep and enjoy them, discharged of the payment of tithes in as large and ample a manner as the abbots, priors, &c., enjoyed the same at the day of their dissolution. The Act which dissolved the smaller monasteries[2], i.e. those of or under the annual value of £200, did not contain any such clause, so that it is usual to speak of the exemption as confined to the greater monasteries. But it must be remarked that the 31 Hen. VIII. c. 13, comprehended all monasteries which were dissolved after February 1535 (27 Hen. VIII.), so that the lands of those smaller abbeys which were surrendered to the king subsequent to the 4th February 1535, come within the operation of the section of the Act that relates to discharge. The 27 Hen. VIII. c. 28, had provided that notwithstanding that Act the king might *continue* any of the said monasteries, which he did in some cases, but which were dissolved by the Act which dissolved the large monasteries[3]. By virtue of the statute 31 Hen. VIII. c. 13, s. 21, the owner of abbey lands was discharged from tithes if he could show that at the time of the dissolution there had been an unity of possession with the requisites above mentioned. To sum up, then, we may state that to establish a claim to exemption:

[1] Lamprey *v.* Rooke, Gwill. 859.

[2] 27 Hen. VIII. c. 28.

[3] Wood's *Inst.* 180.

(*A*) The lands must have belonged to one of the greater monasteries, or of the smaller if they came under the statute; and

(*B*) They must have been held by the monastery discharged of the payment of tithes at the time of the dissolution.

Lands so exempted under the statute have been held free from tithes[1], although they had been paid ever since the Act; and even where land which had formed part of the possessions of an abbey as a fish-pool had been drained and cultivated, it was held that the discharge from tithes remained.

Similar to exemptions derived from unity of possession those of the privileged orders would have been determined by the dissolution of the spiritual body to which they were annexed, but for the provision in the 31 Hen. VIII. c. 13, which also continued them. But at the time of the dissolution there were only two privileged orders, viz. the Cistercians and Hospitallers, the Templars having been dissolved years before, and their lands given to the Hospital of St John of Jerusalem. There was some difference of opinion as to whether the lands of the latter body which came to the Crown by 32 Hen. VIII. c. 24, were entitled to the benefit of the protection contained in 31 Hen. VIII. c. 13. But it was settled in James I.'s reign, in the case of Cornwallis *v.* Sparling[2], that they were.

It was formerly held that the exemption from paying tithes applied only to those who had an estate of inheritance in the land, and not to tenants for life[3]; but this was overruled in the year 1799, and a tenant for life under a settlement was held entitled to the exemption. The case was Hett *v.* Mead[4], and it was objected that a tenant for life of lands formerly belonging to the Cistercian order, and exempt from tithes of lands in the manurance of the owner, had not such an interest in him as would support the privilege; for that to entitle the lands to the exemption, the owner must be the absolute owner, and have the same estate as the monastery had. It was held that there would be no reason why the estate for life and all other

[1] Earl of Clanricarde *v.* Lady Denton, 1 E. and Y. 306.

[2] Gwill. 224.

[3] Wilson *v.* Redman, E. and Y 430.

[4] Gwill. 1515 and 3 E. and Y. 1384.

component parts of the estate should not be exempt as they came into possession, and the Court unanimously decreed that the tenant for life was exempt. It seems, however, that a mere common lessee would not be discharged, because he does not hold a kindred estate to that which the abbeys had done.

An exemption derived from the fact of lands having belonged to a privileged order does not rest on *prescription*. The claimant must therefore show[1] that the monastery was seised of the lands before the year 1215, and also at the time of the dissolution; and as in the case of other monastic lands exempt under statute, proof of payment of tithes by the owners of the lands will not affect the continuation of the privilege[2].

It must not be concluded that the privileged orders were incapable, in consequence of their privilege, from being discharged by real composition or prescription. There has been, however, some difference of opinion, but now the general opinion is[3] that they were as capable as every other order or individual. Their privilege could not deprive them of a right which they had in common with others, otherwise that which was called a privilege would have been a disqualification and not an advantage. A common notion has prevailed that all lands which happen to have belonged to dissolved monasteries were discharged from tithes, but, as we have seen, the law was that they were as liable as any other lands unless a legal exemption could be shown. Thus the greater part of the possessions of the smaller monasteries, the Colleges, Chantries and Free Chapels given to the Crown by statute 1 Ed. VI. were not entitled to exemption unless discharge could be proved by the other legal means. This explains the fact that in our day one piece of land may pay no tithe whilst the adjoining field is titheable.

By section 44 of the Commutation Act any modus, composition real and customary payment instead of tithes were to be taken at their actual amount and added to the value of the other tithes, the only difference being that such payments were

[1] Norton *v.* Hammond, 1 Y. and Jerv. 94.

[2] Stavely *v.* Ullithorne, 1 E. and Y. 418.

[3] Donnison *v.* Elsley, 3 E. and Y. 1393.

for the future converted into rent-charges varying with the price of corn. Disputes as to the amount, or existence of the modus, &c. could be determined by the Tithe Commissioners[1], subject to an appeal to a court of law on an issue or special case, should the yearly payment in dispute exceed the value of £20. When lands were exempted by reason of privilege or where the tithes might be considered as suspended, as in the case of glebe or barren lands, a certain portion of the rent-charge was allotted to each[2] if they had been included in the valuation. The lands of privileged orders would only become liable to the portion fixed on them when they lost the benefit of their privilege by not being in the manurance of their owners. Glebe land belonging to one parson situate in the parish of another[3] was always liable to tithes unless a prescription *in non decimando* had been established. Such lands were then liable to the rent-charge under the Commutation Act, and when in the occupation of the tithe-owner would only be exempt. Barren lands[4] become liable to the portion of the rent-charge fixed upon them at the expiration of seven years after they were brought into cultivation.

[1] SS. 45, 46.
[2] S. 21.
[3] SS. 67 and 71.
[4] S. 67.

CHAPTER XI.

HOUSES as such have never in law been liable for the payment of tithes, yet in the City and Liberties of London they form a notable exception to this rule. Tithes are there paid by all persons liable in law to the relief of the poor. The growth of this practice, from originally a purely voluntary offering into a right by custom, demandable by the parsons of its parishes, and finally confirmed and regulated by Acts of Parliament, was briefly somewhat as follows.

Prior to the year 1228[1] no tithes as tithes were paid in the City, but the clergy were maintained by an offering on each Sunday and Apostle's day of a farthing for every 10*s.* of rent. There is evidence, however[2], that in one of the Liberties, viz. that of St Martin's-le-Grand, tithes as such were paid before that date, but this appears to have been a notable exception. "The fifty-two farthings," Selden says, "so yearly paid on Sundaies only, came so neere to the just tenth of the rent, that they were thought on as a Tithe paid; the other"—that is on the Apostles' days—"being reputed rather by the name of Offerings." Whether to confirm these customary payments or because they had been found to decrease, it appears clear that in the year 1228 the then Bishop of London, Roger Niger, made an ordinance that every occupier of a house should offer

[1] Selden, 244—5. Selden, 245.

[2] Grant's Case, Reports, 11 fol.

as his tithe ½*d.* for 20*s.* a year rental, and ¼*d.* for 10*s.* a year rental, for every Sunday and every Apostle's day whereof the eve was fasted. "By an ancient Ordinance in the said City they are bound, on every Sunday and on the principal Feast Days both of the Holy Apostles and of others whose Eves are fasted, to pay one farthing for every ten shillings of rent of the house which they occupy." ("Ex Ordinatione antiqua," says Lindwood[1], "in dicta Civitate, tenentur, singulis Dominicis diebus et in principalibus Festis et Sanctorum Apostolorum et Aliorum quorum Vigiliæ jejunantur offerre pro singulis X. solidis redditus domus quam inhabitant unum quadrentum.") Taking the Apostles' days at eight the annual amount paid for 20*s.* rent would be 2*s.* 6*d.* and for 10*s.* rent 1*s.* 3*d.* In accordance with this ordinance such tithes were paid by the citizens of London till the year 1389, when Thomas Arundel, Archbishop of Canterbury, made an attempt to increase the number of Apostles' days by adding twenty-two more saints' days, thus increasing the tithe payments to 3*s.* 5*d.* a year. Constant quarrels between the citizens and their clergy followed this arbitrary interference, but the archbishop appears to have gained his point, as it was confirmed by Pope Innocent VII. in 1403. In the records of the Common Council[2] fifty years later there appears a protest against this increased payment, but there seems to be no doubt that it was enforced by the ecclesiastical courts.

In this state the matter remained till the year 1535, when an Act of Parliament[3] was passed, authorising the citizens of London to pay their tithes at a rate of 2*s.* 9*d.* in the pound. Ten years later another Act[4] was passed, in which it was enacted "that the citizens and inhabitants of London and the liberties of the same shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars, curates, of the said city and their successors for the time being, after the following rate: For every 10*s.* rent by the year of all houses, shops, warehouses, cellars, stables, &c. within the City and Liberty 16½*d.*; and for every 20*s.* rent by the year 2*s.* 9*d.*; and so above the

[1] Selden, 244.
[2] Letter-Book K. 32 Hen. III.
[3] 27 Hen. VIII. c. 21.
[4] 37 Hen. VIII. c. 12.

rent of 20*s.* ascending from 10*s.* to 10*s.* according to the rate aforesaid." Further, if no rent were reserved the tithe should be paid according to what the house had been last let for. Provided however that where a less sum than 2*s.* 9*d.* in the pound hath been accustomed to be paid in such cases the former custom shall continue. After the Great Fire of 1666, in consequence of the confusion necessary upon the alteration of houses and streets, an Act of Parliament[1] was passed by which it was intended to reduce the tithing of the City to "certainty." Fifty-one parishes are there named, and amounts allotted opposite their names, varying from £200 per annum, the greatest income of Rectors, to £100 the lowest, over and above perquisites, gifts, &c., which sums of money were to be paid in lieu of tithes[2] in the respective parishes and which should be taken to all intents and purposes to be the respective annual maintenance of the parsons, vicars, &c. of the parishes. The money was to be levied by rate and assessment on the inhabitants made by the Aldermen of the several Wards, Common Councilmen and Churchwardens. In case of refusal or non-payment the Lord Mayor should issue his warrant of distress, and if he refused to do so the Lord Chancellor or Keeper of the Great Seal, or any two or more of the barons of the Exchequer, should issue warrants of distress. In the parishes where there were impropriations, the impropriators were to pay and allow what they formerly used and ought to pay to their several incumbents. No court or judge ecclesiastical or temporal was to have any cognisance of any dispute relating to the sums due in lieu of the tithes except those mentioned in the Act.

It must be remarked that the inhabitants of those parishes within the City and Liberties which were not destroyed by the fire continued under the old system. The general Acts of Parliament referring to tithes which have been passed since the reign of Henry VIII. always exclude tithes of the City of London and Liberties from their operation, and this is also done by the 90th section of the first Commutation Act[3].

During late years, in consequence of numerous disputes

[1] 22 and 23 Car. II. c. 15.
[2] S. 3.
[3] 6 and 7 Will. IV. c. 71.

various Acts of Parliament have been passed dealing with certain of the parishes.

(i) By the Christ Church (City) Tithe Act of 1879[1], the Hospital of St Bartholomew, which had been founded and endowed by Henry VIII. with the impropriate rectory and tithes of the parish of Christ Church, was to receive £1800 in lieu of tithes, which sum was to be levied and collected from persons by law rateable to the poor in the parish. Tithes in arrear could be recoverable by distress in the same way as under the Commutation Act. The Governors of the Hospital were also empowered, if they thought fit, to pay the Vicar of Christ Church £150 a year instead of the £40 already paid.

(2) The City of London Tithes Act[2] of 1879 provides for the commutation of tithes in certain parishes and for the redemption of rent-charges charged upon lands under the Act.

(3) In the parish of St Botolph-without-Aldgate disputes arose as to the payments made to a lay-impropriator under the above Act. In consequence thereof a special Act[3] was passed in 1881, by which he as tithe-owner was to receive £6500 a year in lieu of tithes, which was to be levied and collected by the churchwardens from the persons rateable to the poor, and assessed on the annual rateable value of houses for such poor rates. The owners of houses were empowered to redeem the tithes as if they were rent-charges under the Commutation Act. The sum of £6500 was arrived at by calculation of the sum of 2*s.* 9*d.* on the valuation of the parish, it having been not within the scope of the Act of Charles II. Notice of a new bill to be introduced next session has appeared, by which it is proposed to redeem the tithe of this parish by raising the money on mortgage of the rates of the parish.

We have now traced the history of our subject, from the metaphor which first foreshadowed its conception to the establishment of a purely voluntary system of tithing in the dim light of the dawn of Christianity in our country; to the enforcement of it by the Fathers of the Church as a right with a moral and religious sanction; to the recognition of it as a right in the

[1] 42 and 43 Vict. c. 93.
[2] 42 and 43 Vict. c. 176.
[3] 44 and 45 Vict. c. 197.

strict sense of the term and to its establishment as such by the act of the Legislature. We have seen the gradual extension of the system till it embraced nearly every subject that touches the hand of man—the dying off of some, the increased vitality of the power of the law over others. We have noted the growth of customs, their embodiment in the law of the land and the peculiar rules concerning them which our courts have held. We have observed the causes which have led to important changes in the law; and in our own day the various attempts that have been made to adapt it to a combination of both the principles of justice and the wishes of the people. Though we have come to the end of our history, the history of the Law of Tithe is not yet finished. There may be many changes and startling innovations before that book is closed.

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